[redacted]

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1

Court of Appeals

OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs-Respondents,

against

2

MORRIS MALINSKY and SIDNEY RUDISH,
Defendants-Appellants,

and

JOSEPH INDOVINO,
Defendant.

Statement Under Rule 234

3

This is an appeal from the judgments of conviction of the County Court of Kings County, dated the 19th day of July, 1943, rendered against the defendants, convicting them of the crime of Murder in the First Degree, and sentencing them to be put to death in the electric chair.

Trial was had before Hon. Samuel S. Leibowitz, a County Judge of Kings County, and a jury, commencing on the 14th day of June, 1943, and concluding on the 24th day of June, 1943.

Statement Under Rule 234

Hon. Thomas Cradock Hughes, Acting District Attorney of Kings County, by James A. McGough, Assistant District Attorney, appeared for the People.

The defendant Morris Malinsky was represented by Joseph Solovei, Esq., on the trial, and by an order of Mr. Justice Samuel S. Leibowitz, dated the 4th day of August, 1943, Joseph A. Solovei and David F. Price, Esqs., were assigned as attorneys and counsellors for defendant Malinsky, to perfect and prosecute his appeal.

The defendant Sidney Rudish was represented by Julian V. Carabba, Fred G. Morritt and Saul M. Meadow, Esqs., on the trial, and by an amended order of Mr. Justice Samuel S. Leibowitz, dated the 28th day of July, 1943, Julian V. Carabba, Saul M. Meadow and John J. Fitzgerald, Esqs., were assigned as attorneys and counsellors for defendant Rudish, to perfect and prosecute his appeal.

The defendant Joseph Indovino is not a party to this appeal.

There has been no further change of parties or attorneys.

Notice of Appeal of Defendant, Morris Malinsky

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

MORRIS MALINSKY, indicted as MORRIS MALINSKI,
Defendant.

SIRS:

PLEASE TAKE NOTICE, that the defendant Morris Malinsky, hereby appeals to the Court of Appeals of the State of New York, from a judgment of conviction rendered against him of the crime of Murder in the First Degree, at a Term of the County Court, Kings County, on the 19th day of July, 1943, and from the whole of said judgment and from each and every part thereof.

PLEASE TAKE FURTHER NOTICE, that the defendant, Morris Malinsky, further appeals from an order of the County Court, Kings County made and entered on the 23rd day of July, 1943 denying a motion to amend the record of the trial herein made by the defendant, Morris Malinsky, and further appeals from each and every decision of the Trial Court upon matters of law by which the substantial rights of the said defendant

10 *Notice of Appeal of Defendant, Morris Malinsky*

were prejudiced, and from the Trial Court's denials of the motions to set aside the verdict and the exceptions taken therein.

Dated: Brooklyn, New York August 6th, 1943

Yours, etc.,

JOSEPH SOLOVEI
215 Montague Street
11 Brooklyn, New York

DAVID F. PRICE
66 Court Street
Brooklyn, New York

Attorneys for Defendant

To:

THOMAS CRADOCK HUGHES, Esq.
Acting District Attorney
Municipal Building
Brooklyn, New York

12

FRANCIS J. SINNOTT
County Clerk, Kings County

WARDENS OF SING SING PRISON
Ossining, New York

Notice of Appeal of Defendant, Sidney Rudish

COUNTY COURT

KINGS COUNTY

Indictment #27141

PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

MORRIS MALINSKI, SIDNEY RUDISH,
JOSEPH INDOVINO,
Defendants.

SIRS:

PLEASE TAKE NOTICE that Sidney Rudish, one of the above named defendants, hereby appeals to the Court of Appeals of the State of New York from the judgment of conviction of the crime of murder in the first degree rendered against him in this Court, and the sentence imposed thereunder on the 19th day of July, 1943.

16 *Notice of Appeal of Defendant, Sidney Rudish*

Dated, August 4th, 1943.

Yours, etc.,

JOHN J. FITZGERALD
32 Court Street
Brooklyn, N. Y.

JULIAN V. CARABBA
National City Bank Bldg.
17 5420—13th Ave.
Brooklyn, N. Y.

SAMUEL M. MEADOW
1450 Broadway
Manhattan, New York City
Attorneys for Defendant
Sidney Rudish

To:

Hon. THOMAS CRADOCK HUGHES
Acting District Attorney
18 Kings County, N. Y.
Municipal Building
Brooklyn, N. Y.

CLERK OF THE COUNTY COURT OF KINGS COUNTY
120 Schermerhorn Street
Brooklyn, N. Y.

Amended Notice of Appeal of Defendant, Sidney Rudish

19

COUNTY COURT

KINGS COUNTY

Indictment #27141

PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

20

against

MORRIS MALINSKI, SIDNEY RUDISH,
JOSEPH INDOVINO,
Defendants.

SIRS:

PLEASE TAKE NOTICE that Sidney Rudish, one of the above named defendants, hereby appeals to the Court of Appeals of the State of New York from the judgment of conviction of the crime of Murder in the First Degree rendered against him in this Court, and the sentence imposed thereunder on the 19th day of July, 1943, and from the whole of said judgment and from each and every part thereof.

21

PLEASE TAKE FURTHER NOTICE that the said defendant hereby appeals from and seeks to have reviewed upon this appeal the following orders heretofore made herein:

22 *Amended Notice of Appeal of Defendant, Sidney Rudish*

I. An order made and entered herein on July 23rd, 1943.

(a) Denying the defendant's motion for arrest of judgment.

(b) Denying the defendant's motion for an inspection of the Grand Jury's minutes.

(c) Denying the defendant's motion to dis-
23 miss the indictment herein.

(d) Denying the defendant's motion to set aside the verdict of "Guilty of Murder in the First Degree".

II. An order made and entered herein on the 11th day of August, 1943 denying the said defendant's motion to include the Grand Jury's minutes as a part of the trial record on appeal herein.

Dated, August 14th, 1943.

24 Yours, etc.,

JOHN J. FITZGERALD
32 Court Street
Brooklyn, N. Y.

JULIAN V. CARABBA
National City Bank Bldg.
5420—13th Ave.
Brooklyn, N. Y.

SAMUEL M. MEADOW
1450 Broadway
Manhattan, New York City
Attorneys for Defendant
Sidney Rudish

Amended Notice of Appeal of Defendant, Sidney Rudish

To:

Hon. Thomas Cradock Hughes
Acting District Attorney
Kings County, N. Y.
Municipal Building
Brooklyn, N. Y.

Clerk of the County Court of Kings County
120 Schermerhorn Street
Brooklyn, N. Y.

28

Minutes of Presentment

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 10th day of November 1942.

Present: Hon. Peter J. Brancato,
County Judge.

29

The People of the State of New York

against

Morris Malinski
Sidney Rudish
Joseph Indovino

#27141

30

Proclamation made and Court opened.

The Grand Jury comes into Court and presents indictments against the following named defendants for the crimes set opposite their names respectively.

No. 27141 Morris Malinski, Sidney Rudish, Joseph Indovino. Jointly indicted for Murder-1st Degree.

A true extract from the minutes.

Francis J. Sinnott
Clerk

Indictment

COUNTY COURT

OF THE COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK
Plaintiffs

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO
Defendants

The Grand Jury of the County of Kings, by this indictment, accuse the defendants of the crime of Murder In The First Degree, committed as follows:

The defendants, on or about February 15, 1941, in the County of Kings, acting in concert with Abraham Beitler, deceased, wilfully, feloniously and of malice aforethought shot and killed Leon Fox, with a pistol.

THOMAS CRADOCK HUGHES
Acting District Attorney

Endorsements on Indictment

No. 27141 119/108a

THE PEOPLE

vs.

MORRIS MALINSKY
SIDNEY RUDISH
JOSEPH INDOVINO

MURDER FIRST DEGREE

INDICTMENT

A TRUE BILL.

RICHARD J. CANTILLION
Foreman

THOMAS CRADOCK HUGHES
Acting District Attorney

Filed Nov. 10, 1942

All three Plead Not Guilty
Judge Brancato
A.D.A. Hughes
All three Bail denied—Matter of discretion See Sec. 553 C.C.P.
Tried June 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 1943
Judge Leibowitz
A.D.A. McGough
Part 2
Verdict Malinsky Guilty as charged No Rec. for Life Imp.
Rudish Guilty as charged No Rec. for Life Imp.

Endorsements on Indictment 37

Indovino, Guilty as charged with Rec. for Life Imp.
July polled on all 3.
All Rem.

June 24, 1943

Leibowitz, J.

Three

Defendants personally appear and advised by the Court of their rights pursuant to Section 308 C.C.P. 38
Have you a lawyer? Yes. Have you money to retain a lawyer? Yes. Do you wish the Court to assign a lawyer? No.
Name of Lawyer:
Jos. Solovei for Malinski
Saul M. Meadow for Rudish 1450 B'way N. Y.
V. Impellitteri 233 Bway for Indovino

Morris Malinsky
Counsel Assigned Retained 39
Sex M. W.
Age 24
Nativity Brooklyn
Residence 714 Hinsdale St.
Occupation Helper on truck
Mechanical Trade none
Married yes
Read yes
Degree of Education P.S. 8b
Religion Hebrew
Degree of Religious Instruction Irreg.
Parents Father living

40 *Endorsements on Indictment*

Temperate yes
Drugs no
Previous Conviction 1 Fel.
Sentence Malinski—to be executed in the manner and place prescribed by law during the week of Aug. 29, 1943. Remanded.
Leibowitz, J.
July 19, 1943 part 2
Deft. Rudish refuses to be sworn or to answer any questions.

41 Sentence (Rudish) to be executed in the manner and place prescribed by law during the week of Aug. 29th, 1943. Remanded. Leibowitz, J.
Joseph Indovino assigned
Counsel Assigned M. W.
Sex M. W.
Age 27
Nativity Brooklyn
Residence 2118 Ocean Pkway
Occupation Asbestos Sprayer
Mechanical Trade presser

42 Married yes
Read yes
Degree of Education P.S. 8b
Religion Catholic
Degree of Religious Instruction Regular
Parents Mother living
Temperate yes
Drugs no
Previous Conviction 1 Fel. no misd.
Sentence (Indovino)

43

Minutes of Arraignment

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 10th day of November, 1942.

Present: Hon. PETER J. BRANCATO,
County Judge.

44

THE PEOPLE OF THE STATE OF NEW YORK

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO

#27141

45

Proclamation made and Court opened.

The following named defendants personally appeared and were advised as to their rights pursuant to Section 308 C.C.P.; and were then arraigned to plead to indictment found against them respectively:—

No. 27141 Morris Malinski Sidney Rudish Joseph Indovino Jointly indicted for Murder—1st Degree.

46 *Minutes of Arraignment*

All three plead—Not guilty Bail denied on all three defts.

All three defts. remanded.

Joseph Solovei, Esq., Atty. for Malinski
Saul M. Meadows, Esq., Atty. for Rudish
V. Impelletteri, Esq., Atty. for Indovino

A true extract from the minutes.

FRANCIS J. SINNOTT
Clerk

47

48

49

Minutes of Trial

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 14th day of June, 1943.

Present: SAMUEL S. LEIBOWITZ,
County Judge.

50

THE PEOPLE OF THE STATE OF NEW YORK

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO

Indictment No. 27,141.

51

Jointly indicted for the crime of Murder in the first degree.

Appearances:

James McGough, Esq., Asst. District Attorney.
Joseph A. Solovei, Esq., Atty. for defendant, Malinski.
Messrs. Fred C. Morritt, Saul M. Meadow and Julian V. Carabba, Attorneys for the defendant, Rudish.

52 *Minutes of Trial*

Messrs. Michael Longo, Abraham Multer and William F. X. Geoghan, Attorneys for the defendant, Indovino.

Ralph E. Roberts and Louis Lehman, Official Stenographers.

All three defendants present in Court.

The district attorney moves this indictment for trial, the Court so orders, and the following named special trial jurors were duly drawn, empanelled, examined, accepted and sworn to try
53 the same, the defendants having been informed of their rights pursuant to Section 369 of the Code of Criminal Procedure:

1. Louis S. Yearsley.

Recess for lunch. Juror admonished. Dinner Order signed.

Defendants remanded.

Trial continued after recess.

54 All previous appearances noted.

Defendants present in Court.

The juror heretofore duly sworn returns into Court and answers to the call of his name.

Examination of jurors continued.

The following named special trial jurors were duly drawn, empanelled, examined, accepted and sworn, in addition to the one heretofore duly sworn:

2. Franklin Brower
3. Timothy J. Buckley, Jr.,
4. Harold W. Burns

5. Eugene F. Corwin
6. Isidore M. Horowitz

Recess for supper. Jurors admonished. Supper order signed.

Defendants remanded.

Trial continued after recess.

All previous appearances noted.

Defendants present in Court.

The six jurors heretofore duly sworn return into Court and answer to the call of their names.

Examination of jurors continued.

The following named special trial jurors were duly drawn, empanelled, examined, accepted and sworn, in addition to the six jurors heretofore duly sworn:

7. Charles A. Beier
8. Richard V. Schnibbe
9. Lester Randall
10. Joseph A. Machles
11. Rudolph A. Weiss
12. Karl J. H. Uckert.

The jurors heretofore duly sworn individually were sworn collectively to try this issue.

Pursuant to Section 358A of the Code of Criminal Procedure the following named alternate special trial jurors were duly drawn, empanelled, examined, accepted and sworn to try this issue:

13. Charles J. Knudsen
14. Guy S. Lester.

58 *Minutes of Trial*

Trial continued to Tuesday, June 15, 1943, at 10.30 A.M.

Jurors admonished. Defendants remanded.

Ordered by the Court, that the fourteen members of the jury and the five officers in attendance thereon, be furnished with refreshments and lodging at the Half Moon Hotel, Brooklyn, N.Y. And that the same be a county charge.

59

A true extract of the minutes.

FRANCIS J. SINNOTT
Clerk

60

Minutes of Trial 61

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 15th day of June, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
County Judge.

62

THE PEOPLE OF THE STATE OF NEW YORK,

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO

Indictment No. 27,141.

63

Trial continued from June 14, 1943.

All previous appearances noted.
Defendants present in Court.
The jury return into court and all answer to the call of their names.
Mr. McGough opens for the people.
Mr. Solovei opens for Malinski.
Mr. Carabba opens for Rudish.
Mr. Geoghan moves to dismiss indictment as

64 *Minutes of Trial*

against Indovino on the opening for the people. Motion denied.

Mr. Geoghan opens for Indovino.

People's Witnesses:

Henry Fox, 2343 Valentine Ave., Bronx. Sworn.

Dr. M. Edward Marten, 152 Lenox Road, Brooklyn. Sworn.

Anthony O. DeSario, 1860—52 St., Brooklyn.
65 Sworn.

Herman M. Dolinsky, 845 Prospect Place, Brooklyn. Sworn.

Max Kallman, 1565 E. 18 St., Brooklyn. Sworn.

James Rabbitt, Patrolman #12554—60 Prec. Sworn.

George A. Bremeier, Act. Lt. #955. Sworn.

Recess for lunch. Jury admonished. Defendants remanded.

Dinner order signed.

Trial continued after recess.
66

All previous appearances noted.

Defendants present in Court.

The jurors heretofore duly sworn return into court and answer to the call of their names.

People's witnesses:

George L. Corboy, Patrolman #10543—68 Prec. Sworn.

Edward Basch, Detective #1245—66 Squad. Sworn.

Benjamin Glodowsky, 3066 B. 13 St., Brooklyn. Sworn.

Julius Gimbel, 2358—84th St., Brooklyn. Sworn.

August A. Hollingsworth, 43 Chestnut St., Brooklyn. Sworn.

John Trusch, Detective #860, Ballistics Bureau. Sworn.

Trial continued to June 16, 1943, at 10:30 A. M. Jury admonished. Defendants remanded. Order signed for refreshments and lodgings at the Half Moon Hotel. Supper order signed. 68

A true extract of the minutes.

FRANCIS J. SINNOTT
Clerk.

69

70 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 16th day of June, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
County Judge.

71

THE PEOPLE OF THE STATE OF NEW YORK

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO

Indictment No. 27,141.

72

Trial continued from June 15, 1943.

All previous appearances noted.
Defendants present in Court.
The jurors heretofore duly sworn return into court and answer to the call of their names.

People's witnesses:

David Yellin, Sing Sing State Prison. Sworn.
Question of law between court and counsel discussed in the absence of the jury and the witness.
Jury return. Trial resumed.

Minutes of Trial 73

People's witnesses:

David Yellin, examination continued. Recalled.

Recess for lunch. Jury admonished. Defendants remanded.

Dinner order signed.
Trial continued after recess.
All previous appearances noted.
Defendants present in Court.
The jurors heretofore duly sworn return into court and answer to the call of their names. 74

People's witnesses:

Louis Sonenblick, 722 Van Siclen Ave., Brooklyn. Sworn.
Nathan Spielfogel, Sing Sing State Prison. Sworn.

Short recess. Jury admonished. Jury return. Trial resumed. 75

Nathan Spielfogel, examination continued. Recalled.
Trial continued to June 17, 1943 at 10 A. M.
Jury admonished. Defendants remanded.
Supper order signed. Order signed for lodgings and refreshments at the Half Moon Hotel, Brooklyn, N. Y.

A true extract of the minutes.

FRANCIS J. SINNOTT
Clerk.

Minutes of Trial

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 17th day of June, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
County Judge.

THE PEOPLE OF THE STATE OF NEW YORK

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO

Indictment No. 27,141.

Trial continued from June 16, 1943.

All previous appearances noted.
Defendants present in court.
The jurors heretofore duly sworn return into court and answer to the call of their names.

People's witnesses:

Nathan Spielfogel, cross-examination continued.

Minutes of Trial 79

Short recess. Jury admonished. Jury return. Trial resumed.

Nathan Spielfogel, cross-examination continued.

Simon Eisler, 1846 Pitkin Ave., Brooklyn. Sworn.

Recess for lunch. Jury admonished. Defendants remanded.

80

Dinner order signed.

Trial continued after recess.

All previous appearances noted.

Defendants present in Court.

The jurors heretofore duly sworn return into court and answer to the call of their names.

People's witnesses:

Peter Shamin, 49 Ave. B, N. Y. City. Sworn.

Virginia Goonan, 1327 Amsterdam Ave., N. Y. City. Sworn.

81

Short recess. Jury admonished. Jury return. Trial resumed.

People's witnesses:

Virginia Goonan, examination continued.

Peter DiPisa, 314 E. 31st St., N. Y. City. Sworn.

Frank Maguire, 633 11th St., Brooklyn. Sworn.

82 *Minutes of Trial*

Short recess. Jury admonished. Jury return. Trial resumed.

Frank Maguire, examination continued.

Defendant's witness:

Morris Malinsky, indicted as Morris Malinski, 714 Hinsdale St., Brooklyn. Sworn in his own behalf, for the sole purpose of impeaching alleged confession.

83 Trial continued to June 18, 1943, at 10 A.M.

Jury admonished. Defendants remanded. Supper order signed. Order signed for lodgings and refreshments at the Half Moon Hotel.

A true extract of the minutes.

FRANCIS J. SINNOTT
Clerk.

84

Minutes of Trial 85

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 18th day of June, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
County Judge.

86

THE PEOPLE OF THE STATE OF NEW YORK

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO

Indictment No. 27,141.

87

Trial continued from June 17, 1943.

All previous appearances noted.
Defendants present in court.
The jurors heretofore duly sworn return into court and answer to the call of their names.

People's witnesses:

James McNally, Lt. #262—62 Squad. Sworn.

88 *Minutes of Trial*

James Bell, Jr., Detective #1136—64 Squad. Sworn.

John McNally, Detective #219—66 Squad. Sworn.

Short recess. Jury admonished. Jury return. Trial resumed.

People's witnesses:

George Lowe, Detective #200—60 Squad.
89 Sworn.

Frank Maguire. Recalled.

Recess for lunch. Jury admonished. Defendants remanded.

Dinner order signed.

Trial continued after recess.

All previous appearances noted.

Defendants present in Court.

The jurors heretofore duly sworn return into
90 court and answer to the call of their names.

People's witnesses:

Charles P. Celano, Detective #361, Homicide Squad. Sworn.

Lt. James McNally. Recalled.

Samuel Kovner, Attica State Prison. Sworn.

Short recess. Jury admonished. Jury return. Trial resumed.

Minutes of Trial 91

Samuel Kovner, examination continued.

People rest.

Mr. Solovei moves to dismiss indictment as to Malinski. Denied.

Mr. Geoghan moves to dismiss indictment as to Indovino. Denied.

Mr. Carabba moves to dismiss indictment as to Rudish. Denied.

Trial continued to June 19, 1943 at 9.30 A.M. 92

Jury admonished. Supper order signed. Order for lodgings and refreshments at Half Moon Hotel signed. Defendants remanded.

A true extract of the minutes.

FRANCIS J. SINNOTT
Clerk.

93

94 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 19th day of June, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
County Judge.

95

THE PEOPLE OF THE STATE OF NEW YORK

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO

Indictment No. 27,141.

96

Trial continued from June 18, 1943.

All previous appearances noted.

Defendants present in Court.

The jurors and alternates heretofore duly sworn appear and answer to the call of their names.

The jury is excused and admonished during counsels' additional motions and arguments thereon. See stenographer's minutes for rulings.

Minutes of Trial 97

Jury return and trial resumed.

Mr. McGough moves to re-open people's case. Granted.

People's witness:

Esther Levine, 341 Chester Street, Brooklyn. Sworn.

People rest.

Defendants motions renewed. Same rulings. 98

Defendant's witnesses:

Joseph Brigandi, 1935 West 7th Street, Brooklyn. Sworn.

Celia Indovino, 2118 Ocean Parkway, Brooklyn. Sworn.

Fannie Brigandi, 1935 West 7th Street, Brooklyn. Sworn.

Rose Scuro, 2118 Ocean Parkway, Brooklyn, Sworn and testified through Jos. L. Fair, Italian Interpreter. 99

Joseph Indovino, defendant, 2118 Ocean Parkway, Brooklyn. Sworn.

Recess until June 21, 1943, at 10 A.M. Jury admonished. Defendants remanded. Luncheon and supper order signed. Order for lodgings and refreshments at Half Moon Hotel signed.

A true extract of the minutes.

FRANCIS J. SINNOTT
Clerk.

100 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New Yrok, on the 21st day of June, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
County Judge.

101

THE PEOPLE OF THE STATE OF NEW YORK

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO

Indictment No. 27,141.

102

Trial continued from June 19, 1943.

All previous appearances noted.
Defendants present in court.
The jurors heretofore duly sworn return into court and answer to the call of their names.

Defendant's witnesses:

Joseph Indovino, direct examination continued.

Minutes of Trial 103

Defendant, Indovino, rests.

Mr. McGough moves to re-open people's case. Granted.

People's witnesses:

Solomon C. Schoenberg, 956—50th Street, Brooklyn. Sworn.

People rest. 104

Defendant's motions renewed. Same rulings.

Defendant, Indovino, rests.

Defendant's witnesses:

Rubin Jalkover, 985 Intervale Avenue, Bronx. Sworn.

Sidney Jacob Rudish, defendant, 402 E. 4th Street, N.Y.C. Sworn.

Recess for lunch. Jury admonished. Defendants remanded. 105

Dinner order signed.

Trial continued after recess.

All previous appearances noted.

Defendants present in court.

Jury return into court and all answer to the call of their names.

Defendant's witnesses:

Sidney Jacob Rudish, cross-examination continued.

106 *Minutes of Trial*

Joseph Rudish, 200 E. 6th St., N. Y. City. Sworn.

Defendant, Rudish, rests.

Defendant's witnesses:

Solomon C. Schoenberg, 956—50 St., Brooklyn, Sworn in behalf of the defendant, Malinski.

Morris Malinsky, indicted as Morris Malinski, defendant, 714 Hinsdale Street, Brooklyn.
107 Sworn.

Short recess. Jury admonished. Jury return. Trial resumed.

Morris Malinsky, direct examination continued.

Rubin Jalkover, recalled for further cross-examination.

Trial continued to June 22, 1943, at 10 A. M.

Jury admonished. Defendants remanded. Supper order signed.

Order for lodgings and refreshments at the
108 Half Moon Hotel signed.

A true extract of the minutes.

FRANCIS J. SINNOTT
Clerk.

Minutes of Trial 109

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 22nd day of June, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
County Judge.

110

THE PEOPLE OF THE STATE OF NEW YORK

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO

Indictment No. 27,141.

111

Trial continued from June 21, 1943.

All previous appearances noted.
Defendants present in court.
The jurors heretofore duly sworn return into court and all answer to the call of their names.

Defendants witnesses:

Earl M. Bagnall, 4746—40 Street, Sunnyside, L. I. Sworn.
Defendant, Malinski, rests.

112 *Minutes of Trial*

People's witnesses in rebuttal:

Harold Guider, 385 Argyle Road, Brooklyn. Sworn.

Abraham Kaye, 101 Lincoln Road, Brooklyn. Sworn.

Harry Drobner, 85 Morton Street, Brooklyn. Sworn.

Edward Groehl, 301 East 7th Street, Manhattan. Sworn.

113 Peter Shamin. Recalled.

Short recess. Jury admonished. Arguments in the absence of the jury.

Jury return. Trial resumed.

Peter Shamin, examination continued.

Recess for lunch. Jury admonished. Defendants remanded.

Dinner order signed.

Trial continued after recess.

All previous appearances noted. Defendants present in court.

114 The jurors heretofore duly sworn return into court and answer to the call of their names.

People's witnesses in rebuttal:

Peter Shamin, cross-examination continued.

Nathan Spielfogel. Recalled.

People rest.

Defendant, Malinski, rests.

Short recess. Jury admonished. Discussions and rulings on questions of law during the absence of the jury. See Stenographer's minutes.

115

All defendants renew motions made at the end of the people's case.

All denied. See stenographer's minutes for decisions on all questions of law.

Jury return. Trial resumed.

Trial continued to June 23, 1943, at 10 A.M.

Jury admonished. Defendants remanded. Supper order signed.

Order signed for lodgings and refreshments at the Half Moon Hotel.

116

A true extract of the minutes.

FRANCIS J. SINNOTT
Clerk.

117

118 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 23rd day of June, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
County Judge.

119

THE PEOPLE OF THE STATE OF NEW YORK

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO

Indictment No. 27,141.

120

Trial continued from June 22, 1943.

All previous appearances noted.

Defendants present in court.

The jurors heretofore duly sworn return into court and answer to the call of their names.

Mr. Geoghan sums up to the jury for defendant, Indovino.

Mr. Carabba sums up to the jury for defendant, Rudish.

121

Recess for lunch. Jury admonished. Defendants remanded.

Dinner order signed.

Trial continued after recess. All previous appearances noted. Defendants present in Court.

The jurors heretofore duly sworn return into court and answer to the call of their names.

Mr. Solovei sums up to the jury for the defendant Malinski.

Supper order signed. Order for lodgings and refreshments at the Half Moon Hotel signed. Trial continued to June 24, 1943 at 10 A. M. Jury admonished. Defendants remanded.

122

A true extract of the minutes.

FRANCIS J. SINNOTT
Clerk.

123

124 *Minutes of Trial*

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 24th day of June, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
County Judge.

125

THE PEOPLE OF THE STATE OF NEW YORK

against

MORRIS MALINSKI
SIDNEY RUDISH
JOSEPH INDOVINO

Indictment No. 27,141.

126

Trial continued from June 23, 1943.

All previous appearances noted.
Defendants present in Court.
The jurors heretofore duly sworn return into court and answer to the call of their names.
Mr. McGough sums up to the jury for the people.

Recess for lunch. Jury admonished. Defendants remanded.

Dinner order signed.

Trial continued after recess. All previous appearances noted.

Defendants present in court.

The jurors heretofore duly sworn return into court and answer to the call of their names.

The court charges the jury.

The alternate jurors, #13, Charles J. Knudsen, and #14, Guy S. Lester, are discharged in accordance with the provisions of Section 358a of the Code of Criminal Procedure.

128 The jury retire to deliberate in charge of Officers Lehritter and Litowitz, who were first duly sworn.

Defendants remanded. Supper order signed.

The jury return into court in the presence of defendant, Malinski, represented by Joseph A. Solovei, Esq., defendant Rudish, represented by Julian V. Carabba, Esq., Saul M. Meadow, Esq., Fred G. Morritt, Esq., defendant, Indovino, represented by Michael Longo, Esq., of counsel, all answer to the call of their names and say they find the defendant, Malinski, guilty as charged

129 without a recommendation for life imprisonment; the defendant, Rudish guilty as charged without a recommendation for life imprisonment; defendant, Indovino, guilty as charged with a recommendation for life imprisonment, and so say they all.

Mr. Solovei moves to poll the jury for defendant, Malinski.

Jury polled and each juror for himself says that his verdict is guilty as charged.

Mr. Carabba moves to poll the jury for defendant, Rudish.

130 *Minutes of Trial*

Jury polled and each juror for himself says that his verdict is guilty as charged.

Mr. Longo moves to poll the jury for defendant, Indovino.

Jury polled and each juror for himself says that his verdict is guilty as charged with a recommendation for life imprisonment.

All motions reserved. Defendants remanded, for sentence.

131 A true extract of the minutes.

FRANCIS J. SINNOTT
Clerk.

132

133

Notice of Motion by Defendant Sidney Rudish for Orders in Arrest of Judgment, to Inspect Grand Jury Minutes, to Dismiss Indictment, and to Set Aside the Verdict

COUNTY COURT

KINGS COUNTY

Indictment No. 27,141.

134

PEOPLE OF THE STATE OF NEW YORK,

against

SIDNEY RUDISH, *et al.*,
Defendants.

SIR:—

PLEASE TAKE NOTICE that, upon the annexed 135
affidavit of Saul M. Meadow, sworn to July 16, 1943, and upon all the previous papers, pleadings and proceedings heretofore filed and had herein, and more particularly the indictment herein, the undersigned will move this court, at a Special Term thereof, Part II, before Hon. Samuel S. Leibowitz, to be held in and for the County of Kings, at the County Court House in the Borough of Brooklyn, City of New York, on July 19th, 1943, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can

136 *Notice of Motion by Defendant Sidney Rudish for Orders in Arrest of Judgment, to Inspect Grand Jury Minutes, to Dismiss Indictment, and to Set Aside the Verdict*

be heard, for an order in arrest of judgment, for an order to inspect the grand jury minutes, and for a further order to dismiss the indictment herein, and for such other and further relief as to this court may seem just and proper in the premises, and also for an order setting aside the verdict as being contrary to the weight of evidence.

137

Dated, New York, July 16, 1943.

Yours etc.,

SAUL M. MEADOW,
1450 Broadway,
New York, N. Y.

FRED G. MORRITT,
280 Broadway,
New York, N. Y.

138

JULIAN V. CARABBA,
5420—13th Avenue,
Brooklyn, N. Y.

Attorneys for Defendant
Sidney Rudish.

To:

THOMAS CRADDOCK HUGHES, Esq.,
Acting District Attorney of Kings County.

Affidavit of Saul M. Meadow, Read in Support of Defendant Rudich's Motion in Arrest of Judgment, etc. 139

COUNTY COURT

KINGS COUNTY

PEOPLE OF THE STATE OF NEW YORK

against

140

SIDNEY RUDISH, *et al.*,
Defendants.

State of New York }
County of New York } ss.:

SAUL M. MEADOW, being duly sworn, deposes and says:

I am one of the attorneys and assigned counsel for the defendant Sidney Rudish above named. 141

The said defendant was indicted on November 10th, 1942, for the crime of murder in the first degree, together with Morris Malinsky and Joseph Indivino.

That the said defendant Sidney Rudish pleaded "Not Guilty" to the indictment as above described on said November 10th, 1942, and was brought to trial in the County Court, Kings County, at Part 11, before Hon. Samuel S. Leibowitz and a jury, on June 14th, 1943.

That during the course of the trial, solely two witnesses testified against this defendant Sidney

142 *Affidavit of Saul M. Meadow, Read in Support of Defendant Rudish's Motion in Arrest of Judgment, etc.*

Rudish, implicating him as one of the co-conspirators in the commission of the alleged crime of the murder of Patrolman Leon Fox. That one of the said witnesses was one Davey Yellin, who testified that the defendant Sidney Rudish admitted to him that the defendant Sidney Rudish was at the scene of the crime and participated in the hold-up which resulted in the murder of Patrolman Leon Fox. The only other witness
143 who testified for the People against the defendant Sidney Rudish and one Nathan Spielfogel, who testified to admissions by the defendant Sidney Rudish.

Other than the admissions by these two witnesses, there was not one iota of evidence in the case to link the defendant Sidney Rudish with the crime.

That on cross-examination the witness Spielfogel testified that he did not appear before the Grand Jury and testify there.

That Davey Yellin is and was a co-conspirator
144 was ruled as a matter of law, and seemed apparent on its face, inasmuch as he participated in conveying messages to proposed co-conspirators. That the only testimony that could have appeared against the defendant Sidney Rudish before the Grand Jury was the testimony of the said David Yellin.

That Section 399 of the Code of Criminal Procedure provides that a conviction cannot be had upon testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

Affidavit of Saul M. Meadow, Read in Support of Defendant Rudish's Motion in Arrest of Judgment, etc. 145

That Section 258 of the Code of Criminal Procedure provides that an indictment ought to be found when all the evidence before the Grand Jury taken together is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the Trial jury.

That since it is clear from the record that Spielfogel did not testify before the Grand Jury and I am of the opinion that Yellin did not testify before the Grand Jury, the indictment 146 should be dismissed as a matter of law.

That at the trial, when I was first apprised of the fact that Spielfogel did not testify before the Grand Jury and felt convinced that the indictment was invalid as a matter of law, I made various motions addressed to the Trial Court for an inspection of the Grand Jury minutes and for a dismissal of the indictment on the ground that the same was illegal.

That this application for an arrest of judgment is presently made due to the fact that it is imperative that a ruling be made upon this 147 motion prior to judgment being rendered herein. The importance of this case is clear inasmuch as it is mandatory for the Court to pronounce the sentence of death in reference to the defendant Sidney Rudish. If the Court will allow an inspection of the Grand Jury minutes prior to passing judgment, irrevocable harm will be avoided since a man's life is at stake.

That this application is made in good faith, and that I have personally appeared throughout the trial and am firmly convinced after listening to all of the witnesses for the People

148 *Affidavit of Saul M. Meadow, Read in Support of Defendant Rudish's Motion in Arrest of Judgment, etc.*

that the indictment was illegally obtained, inasmuch as it did not comply with the requisites for an indictment under the Code of Criminal Procedure as above outlined. Undoubtedly, the provisions of the Code of Criminal Procedure was passed so as to cover a case of this type wherein alleged co-conspirators attempt to implicate innocent persons in reference to the commission of a crime. The verdict of "Guilty"
149 should be set aside because it is against the weight of credible, reliable and believable testimony, and not beyond a reasonable doubt.

That no previous application has been made for the relief sought herein.

WHEREFORE, it is respectfully prayed that judgment in the above case in reference to the defendant Sidney Rudish be arrested and that an inspection of the Grand Jury minutes be granted, and the indictment be dismissed as being illegal and not in conformity with the
150 Code of Criminal Procedure.

SAUL M. MEADOW.

Sworn to before me this 16th day of July, 1943.

GERTRUDE FEINMAN,
Commissioner of Deeds,
City of New York,
My commission expires February 16, 1945.
N. Y. Co. Clk's No. 21.

151

Order Denying Motion of Defendant Rudish in Arrest of Judgment, etc.

At a Term, Part II, of the County Court of Kings County, held at the Kings County Court House, 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 21st day of July, 1943.

Present—Hon. SAMUEL S. LEIBOWITZ,
County Judge.

152

PEOPLE OF THE STATE OF NEW YORK,

against

SIDNEY RUDISH, *et al.*,
Defendants.

153

The above named defendant Sidney Rudish having moved this court for an order in arrest of judgment, for an order to inspect the Grand Jury minutes, for an order dismissing the indictment herein, and for an order setting aside the verdict of "Guilty" as being contrary to the weight of evidence and law, and the said motion having duly come on and been heard on July 19th, 1943;

Now, on reading and filing the notice of motion, dated July 16th, 1943, and the affidavit of

154 *Order Denying Motion of Defendant Rudish in Arrest of Judgment, etc.*

Saul M. Meadow, sworn to July 16th, 1943, in support of said motion, and upon all other papers and proceedings heretofore had herein, and after hearing Saul M. Meadow, Esq., and Fred G. Morritt and Julian V. Carabba, in support of said motion, and James A. McGough, Assistant District Attorney, in opposition thereto, and due deliberation having been had, it is

155 ORDERED, ADJUDGED AND DECREED that the said motion be, and the same hereby is, in all respects, denied.

Enter

SAMUEL S. LEIBOWITZ,
County Judge.

Granted July 21, 1943
FRANCIS J. SINNOTT,
Clerk.

156

157

Order Denying Motion of Defendant Rudish to Inspect Grand Jury Minutes, etc.

At a Term, Part II, of the County Court of Kings County, held at the Courthouse thereof, 120 Schermerhorn St., Borough of Brooklyn, City of New York, on the 23rd day of July, 1943.

Present—Hon. SAMUEL S. LEIBOWITZ,
County Judge.

158

Indictment No. 27,141.

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

SIDNEY RUDISH, *et al.*,
Defendants.

159

The above named defendant Sidney Rudish having moved this court for an order, granting to the defendant an inspection of the grand jury minutes and for a further order, dismissing the indictment, and for an order setting side the verdict as contrary to the weight of evidence, and the said motion having come on to be heard on July 19, 1943,

Now upon reading and filing the notice of motion dated July 16, 1943; the affidavit of Saul

160 *Order Denying Motion of Defendant Rudish to Inspect Grand Jury Minutes, etc.*

M. Meadow, duly verified July 16, 1943, submitted in support of said motion and upon all other papers and proceedings heretofore had herein, and after hearing Saul M. Meadow, Esq., Fred G. Morritt, Esq., and Julian V. Carabba, Esq., by Fred G. Morritt, Esq., of counsel, attorneys for the defendant, Sidney Rudish, in support of said motion and James A. McGough, assistant district attorney, in opposition thereto
161 and due deliberation having been had, it is on motion of Thomas Cradock Hughes, acting district attorney of Kings County,

ORDERED that the said motion be, and the same hereby is, in all respects denied.

Enter

SAMUEL S. LEIBOWITZ,
County Judge.

Granted July 23, 1943,
162 FRANCIS J. SINNOTT,
Clerk.

Notice of Motion by Defendants to Amend Record

163

COUNTY COURT

KINGS COUNTY

Indictment No. 27,141

THE PEOPLE OF THE STATE OF NEW YORK

164

against

MORRIS MALINSKY, *et al.*,
Defendants.

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Joseph A. Solovei, attorney for defendant Morris Malinsky, sworn to the 9th day 165
of July, 1943; the affidavits of William F. X. Geoghan, Abraham J. Multer and Michael F. Longo, attorneys for defendant Joseph Indovino, sworn to respectively the 14th day of July, 1943, the 9th day of July, 1943 and the 9th day of July, 1943, the affidavits of Julian V. Carabba, Saul M. Meadow and Fred G. Moritt, attorneys for defendant Sidney Rudish, sworn to respectively the 15th day of July, 1943, the 9th day of July, 1943, and the 9th day of July, 1943; and upon the indictment and the trial, and upon all the pleadings and proceedings heretofore had

166 *Notice of Motion by Defendants to Amend Record*

herein, a motion will be made at Part 1 of the County Court, Kings County, at the Courthouse, 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 19th day of July, 1943, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order amending the record in the above entitled action; and for such other and further relief as to the Court may seem just and
167 proper in the premises.

Dated: Brooklyn, New York July 15, 1943

Yours etc.,

JOSEPH A. SOLOVEI
Attorney for Defendant
Morris Malinsky
215 Montague Street
Borough of Brooklyn
City of New York.

168 WILLIAM F. X. GEOGHAN
Attorney for Defendant
Joseph Indovino
32 Court Street
Brooklyn, New York

ABRAHAM J. MULTER
Attorney for Defendant
Joseph Indovino
120 Broadway
New York City

Notice of Motion by Defendants to Amend Record 169

MICHAEL F. LONGO
Attorney for Defendant
Joseph Indovino
521 Fifth Avenue
New York City

JULIAN V. CARABBA
Attorney for Defendant
Sidney Rudish
5420—13th Avenue
Brooklyn, New York 170

SAUL M. MEADOW
Attorney for Defendant
Sidney Rudish
1450 Broadway
New York City

FRED G. MORITT
Attorney for Defendant
Sidney Rudish
280 Broadway
New York City 171

To:

THOMAS CRADOCK HUGHES, Esq.,
Acting District Attorney
Kings County

172 **Affidavit of Joseph A. Solovei, Read in Support of Defendants' Motion to Amend Record**

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

173 *against*

MORRIS MALINSKY, *et al.*,
Defendants.

State of New York }
County of Kings } ss.:

JOSEPH A. SOLOVEI, being duly sworn, deposes and says:

174 That he is the attorney for the defendant Morris Malinsky, who was indicted with the defendants Sidney Rudish and Joseph Indovino by the Grand Jury of the County of Kings for the crime of Murder in the First Degree.

That the defendants were arraigned on said indictment and plead "not guilty". That on the 14th day of June, 1943, the indictment was moved for trial in the County Court, Kings County, Part 11 thereof, before County Judge Samuel S. Leibowitz, and a Jury was impanelled and duly sworn. That on the 15th day of June, 1943, witnesses were actually called and evidence taken at the

Affidavit of Joseph A. Solovei, Read in Support of Defendants' Motion to Amend Record 175

trial. That the case was tried continuously up to and including the 24th day of June, 1943. That on the 24th day of June, 1943, the Judge charged the Jury. The Judge then said to the Jury as follows:

> "You may retire, gentlemen, and consider your verdict. The 13th and 14th jurors, the alternates in the case, are now discharged from further duties in connection with 176
> this case, with the thanks of the Court. The defendants are remanded".

That the defendants were then actually taken into custody by the officers of the Court and remanded as directed by the Court, and removed from the Courtroom.

Your deponent, as counselor for the defendant Morris Malinsky, asks that the record be amended to show that after the defendants were remanded, the following took place in open Court in the presence of the jury and in the absence of the defendants: 177

> "Gentlemen, what is the attitude of counsel on both sides with reference to exhibits?
> Mr. McGough: I will consent they go in
> Mr. Geoghan: Except the statement.
> The Court: Well, who is here—you are the defendant Malinsky's counsel—what about the exhibits, Mr. Solovei?
> Mr. Solovei: I don't know,
> The Court: Do you consent or do you not?
> Mr. Solovei: I have no objection.

178 *Affidavit of Joseph A. Solovei, Read in Support of Defendants' Motion to Amend Record*

The Court: All right then, you consent.

What about the counsel for the defendant Rudish?

Mr. Carabba: The defendant Rudish excepts to any exhibits, because none of them are binding on him.

The Court: No; I mean if the Jury wants the exhibits in the jury room?

179 Mr. Meadow: No objection.

The Court: What about the exhibits, Mr. Geoghan, in behalf of Indovino?

Mr. Geoghan: I have no objection to the exhibits except one. That Mr. McGough and I have agreed should not go in.

Mr. McGough: That is the statement of Malinsky.

Mr. Geoghan: The statement that was read; that is the only one.

The Court: Has that been deleted?

Mr. McGough: In the case of that statement, I have an exact copy of it made
180 with those names taken out. If all parties consent we can mark that

Mr. Solovei: I object to the statement.

The Court: You must not say anything more with reference to it. Let us not say another word except, with reference to the confession of Malinsky so-called, the jury may have all of the other exhibits? Is that plain? Now, gentlemen, if you want this alleged confession read—if you want to refresh your recollection as to what it says—you may come back to the court room and I will have the stenographer

Affidavit of Joseph A. Solovei, Read in Support of Defendants' Motion to Amend Record

read it from his minutes. Is that plain? Even though I am not sending it into the jury room, that does not foreclose you from having your recollections refreshed as to what is in that document, namely, the alledged confession of Malinsky; but if you wish you may come back to the court-room and I will have Mr. Roberts read it to you.

Mr. Solovei: I take an exception to that your Honor

The Court: You have your exception. All right, you may retire, gentlemen, and consider your verdict."

That immediately after the above took place, in the absence of the defendants, the jury retired for their deliberations, and thereafter returned to the Courtroom, finding the defendant Morris Malinsky guilty of Murder in the First Degree, the defendant Sidney Rudish guilty of Murder in the First Degree, and the defendant Joseph Indovino guilty of Murder in the First Degree with a recommendation.

WHEREFORE, your deponent respectfully prays that an order be made herein amending the record as prayed for herein, and for such other and further relief as the Court may deem just and proper in the premises.

JOSEPH A. SOLOVEI

Sworn to before me this 9th day of July, 1943.

EMMA L. ORSCHIEDT
Notary Public,
Kings Co

184 **Affidavit of Julian V. Carabba, Read in Support of Defendants' Motion to Amend Record**

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

185 *against*

MORRIS MALINSKY, *et al.*,
Defendants.

State of New York }
County of Kings } ss.:

JULIAN V. CARABBA, being duly sworn, deposes and says:

186 That he is one of the assigned counsel who appeared and represented the defendant Sidney Rudish.

That on the 14th day of June, 1943, your deponent appeared at the trial on behalf of the defendant Sidney Rudish, and more particularly, was present on the 24th day of June, 1943, when the case was concluded and given to the Jury for their consideration. That your deponent was actually present when Judge Leibowitz charged the Jury and when the Jury retires.

That your deponent has read the affidavit of

Affidavit of Julian V. Carabba, Read in Support of Defendants' Motion to Amend Record 187

Joseph A. Solovei, and in every respect substantiates and corroborates the facts therein contained and knows of his own knowledge that the same are true. That your deponent, as one of the assigned counsel for the defendant Sidney Rudish, joins in the application of Joseph A. Solovei that the record be amended to read as more fully stated in the affidavit of Joseph A. Solovei. That your deponent repeats and reiterates all the facts contained in the affidavit 188
of Joseph A. Solovei as part of this affidavit as though more fully set forth and stated herein.

WHEREFORE, your deponent prays that an order be made herein amending the record as more specifically prayed for in the annexed affidavit of Joseph A. Solovei.

JULIAN V. CARABBA

Sworn to before me this 15th day of July, 1943.

189

EMMA L. ORSCHIEDT
Notary Public
Kings Co.
Commission exp. Mar. 30, 1944

190

Affidavit of Saul M. Meadow, Read in Support of Defendants' Motion to Amend Record

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

191

against

MORRIS MALINSKY, *et al.*,
Defendants.

State of New York }
County of Kings } ss.:

SAUL M. MEADOW, being duly sworn, deposes
192 and says:

That he is one of the assigned counsel who appeared and represented the defendant Sidney Rudish.

That on the 14th day of June, 1943, your deponent appeared at the trial on behalf of the defendant Sidney Rudish, and more particularly, was present on the 24th day of June, 1943, when the case was concluded and given to the jury for their consideration. That your deponent was actually present when Judge Leibowitz charged the jury and when the jury retired.

Affidavit of Saul M. Meadow, Read in Support of Defendants' Motion to Amend Record 193

That your deponent has read the affidavit of Joseph A. Solovei, and in every respect substantiates and corroborates the facts therein contained and knows of his own knowledge that the same are true. That your deponent, as one of the assigned counsel for the defendant Sidney Rudish, joins in the application of Joseph A. Solovei that the record be amended to read as more fully stated in the affidavit of Joseph A. Solovei. That your depondent repeats and re- 194
iterates all the facts contained in the affidavit of Joseph A. Solovei as part of this affidavit as though more fully set forth and stated herein.

WHEREFORE, your deponent prays that an order be made herein amending the record as more specifically prayed for in the annexed affidavit of Joseph A. Solovei.

SAUL M. MEADOW

Sworn to before me this 9th day of July, 1943. } 195

EMMA L. ORSCHIEDT,
Notary Public,
Kings Co.
Term exp. Mar. 30, 1944.

196 **Affidavit of Fred G. Moritt, Read in Support of Defendants' Motion to Amend Record**

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

197 *against*

MORRIS MALINSKY, *et al.*,
Defendants.

State of New York }
County of Kings } ss.:

FRED G. MORITT, being duly sworn, deposes and says:

198 That he is one of the assigned counsel who appeared and represented the defendant Sidney Rudish.

That on the 14th day of June, 1943, your deponent appeared at the trial on behalf of the defendant Sidney Rudish, and more particularly, was present on the 24th day of June, 1943, when the case was concluded and given to the jury for their consideration. That your deponent was actually present when Judge Leibowitz charged the Jury and when the Jury retired.

Affidavit of Fred G. Moritt, Read in Support of Defendants' Motion to Amend Record 199

That your deponent has read the affidavit of Joseph A. Solovei, and in every respect substantiates and corroborates the facts therein contained and knows of his own knowledge that the same are true. That your deponent, as one of the assigned counsel for the defendant Sidney Rudish, joins in the application of Joseph A. Solovei that the record be amended to read as more fully stated in the affidavit of Joseph A. Solovei. That your deponent repeats and re- 200
iterates all the facts contained in the affidavit of Joseph A. Solovei as part of this affidavit as though more fully set forth and stated herein.

WHEREFORE, your deponent prays that an order be made herein amending the record as more specifically prayed for in the annexed affidavit of Joseph A. Solovei.

FRED G. MORITT.

Sworn to before me this 9th day of July, 1943. } 201

EMMA L. ORSCHIEDT,
Notary Public,
Kings Co.

202 **Affidavit of Abraham J. Multer, Read in Support of Defendants' Motion to Amend Record**

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

203 *against*

MORRIS MALINSKY, *et al.*,
Defendants.

State of New York }
County of Kings } ss.:

ABRAHAM J. MULTER, being duly sworn, de-
204 poses and says:

That he is one of the assigned counsel who appeared and represented the defendant Joseph Indovino.

That on the 14th day of June, 1943, your deponent appeared at the trial on behalf of the defendant Joseph Indovino, and more particularly, was present on the 24th day of June, 1943, when the case was concluded and given to the jury for their consideration. That your deponent was actually present when Judge Leibowitz charged the Jury and when the Jury retired.

Affidavit of Abraham J. Multer, Read in Support of Defendants' Motion to Amend Record 205

That your deponent has read the affidavit of Joseph A. Solovei, and in every respect substantiates and corroborates the facts therein contained and knows of his own knowledge that the same are true. That your deponent, as one of the assigned counsel for the defendant Joseph Indovino, joins in the application of Joseph A. Solovei that the record be amended to read as more fully stated in the affidavit of Joseph A. Solovei. That your deponent repeats and re- 206
iterates all the facts contained in the affidavit of Joseph A. Solovei as part of this affidavit as though more fully set forth as stated herein.

WHEREFORE, your deponent prays that an order be made herein amending the record as more specifically prayed for in the annexed affidavit of Joseph A. Solovei.

ABRAHAM J. MULTER

Sworn to before me this 9th day of July, 1943. } 207

EMMA L. ORSCHIEDT
Notary Public
Kings County
Term exp. Mar. 30, 1944.

208

Affidavit of Michael F. Longo, Read in Support of Defendants' Motion to Amend Record

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

209 *against*

MORRIS MALINSKY, *et al.*,
Defendants.

State of New York }
County of Kings } ss.:

MICHAEL F. LONGO, being duly sworn deposes and says:

210

That he is one of the assigned counsel who appeared for and represented the defendant Joseph Indovino.

That on the 14th day of June, 1943, your deponent appeared at the trial on behalf of the defendant Joseph Indovino, and more particularly, was present on the 24th day of June, 1943, when the case was concluded and given to the Jury for their consideration. That your deponent was actually present when Judge Leibowitz charged the Jury and when the Jury retired.

Affidavit of Michael F. Longo, Read in Support of Defendants' Motion to Amend Record 211

That your deponent has read the affidavit of Joseph A. Solovei, and in every respect substantiates and corroborates the facts therein contained and knows of his own knowledge that the same are true. That your deponent, as one of the assigned counsel for the defendant Joseph Indovino, joins in the application of Joseph A. Solovei that the record be amended to read as more fully stated in the affidavit of Joseph A. Solovei. That your deponent repeats and reiterates all the facts contained in the affidavit of Joseph A. Solovei as part of this affidavit as though more fully set forth and stated herein. 212

WHEREFORE, your deponent prays that an order be made herein amending the record as more specifically prayed for in the annexed affidavit of Joseph A. Solovei.

MICHAEL F. LONGO

Sworn to before me this 9th day of July, 1943. } 213

AMY WREN
Notary Public
Kings Co.

214 **Affidavit of William F. X. Geoghan, Read in Support of Defendants' Motion to Amend Record**

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

215 *against*

MORRIS MALINSKY, *et al.*,
Defendants.

State of New York }
County of Kings } ss.:

WILLIAM F. X. GEOGHAN, being duly sworn,
216 deposes and says:

That he is one of the assigned counsel who appeared and represented the defendant Joseph Indovino.

That on the 14th day of June, 1943, your deponent appeared at the trial on behalf of the defendant Joseph Indovino, and more particularly, was present on the 24th day of June, 1943, when the case was concluded and given to the jury for their consideration. That your deponent was actually present when Judge Leibowitz charged the Jury and when the Jury retired.

Affidavit of William F. X. Geoghan, Read in Support of Defendants' Motion to Amend Record

217

That your deponent has read the affidavit of Joseph A. Solovei hereto annexed, and in every respect substantiates and corroborates the facts herein contained and knows of his own knowledge that the same are true. That your deponent, as one of the assigned counsel for the defendant Joseph Indovino, joins in the application of Joseph A. Solovei that the record be amended to read as more fully stated in the affidavit of Joseph A. Solovei. That your deponent repeats and reiterates all the facts contained in the affidavit of Joseph A. Solovei as part of this affidavit as though more fully set forth and stated herein.

218

WHEREFORE, your deponent prays that an order be made herein amending the record as more specifically prayed for in the annexed affidavit of Joseph A. Solovei.

WILLIAM F. X. GEOGHAN

219

Sworn to before me this 14th day of July, 1943.

HARRY P. ALPERT
Harry P. Albert, Notary Public
Kings Co Clks No. 201 Reg No. 14A5
N. Y. Co. Clerks No. 9, Reg No. 17A5
Commission expires March 30, 1945

220

Order Denying Defendants' Motion to Amend Record

At a Term, Part 11, of the County Court of Kings County held at the Courthouse thereof, 120 Schermerhorn St., Borough of Brooklyn, City of New York, on the 23rd day of July 1943.

Present: Hon. SAMUEL LEIBOWITZ,
County Judge.

221

Indictment No. 27141

THE PEOPLE OF THE STATE OF NEW YORK
Plaintiffs,

against

MORRIS MALINSKY, *et al.*,
Defendants.

222

The above named defendants having moved this Court for an order amending the record in the above entitled action and the said motion having come on to be heard on the 19th day of July, 1943,

Now upon reading and filing the notice of motion dated July 15, 1943; the affidavits of Joseph A. Solovei, Abraham J. Multer, Michael F. Longo, Saul M. Meadow and Fred G. Morritt, all duly verified July 9, 1943; the affidavit of

Order Denying Defendants' Motion to Amend Record 223

William F. X. Geoghan, duly verified July 14, 1943; the affidavit of Julian V. Carraba, duly verified July 15, 1943, submitted in support of said motion, and upon all other papers and proceedings heretofore had herein, and after hearing Joseph A. Solovei, Esq., attorney for the defendant, Morris Malinsky; Abraham J. Multer, Esq., William F. X. Geoghan, Esq., and Michael F. Longo, Esq., by Abraham J. Multer, Esq., of counsel, attorneys for the defendant, 224
Joseph Indovino; Fred G. Morritt, Esq., Julian V. Carraba, Esq., and Saul M. Meadow, Esq., by Fred G. Morritt, Esq., of Counsel, attorneys for the defendant, Sidney Rudish, in support of said motion and James A. McGough, assistant district attorney, in opposition thereto, and after taking testimony, and due deliberation having been had, it is on motion of Thomas Cradock Hughes, acting district attorney of Kings County,

ORDERED that the said motion be, and the same 225
hereby is, in all respects denied.

Enter

SAMUEL S. LEIBOWITZ
County Judge

Granted Jul 23 1943
FRANCIS J. SINNOTT
clerk

226 **Notice of Motion by Defendant Rudish for an Order Making Grand Jury Minutes a Part of Record on Appeal**

COUNTY COURT

KINGS COUNTY

Indictment No. 27,141

227 PEOPLE OF THE STATE OF NEW YORK,

against

SIDNEY RUDISH, *et al.*,
Defendants.

SIR:

228 PLEASE TO TAKE NOTICE that, upon the annexed affidavit of Saul M. Meadow, sworn to August 5th, 1943, and upon all the previous papers, pleadings, and proceedings heretofore filed and had herein, and the indictment herein, the undersigned will move this court, at a Special Term Part I thereof, to be held in and for the County of Kings, at the County Court House in the Borough of Brooklyn, City of New York on August 9th, 1943, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order making the Grand Jury minutes a part of the Trial Record on appeal,

Notice of Motion by Defendant Rudish for an Order Making Grand Jury Minutes a Part of Record on Appeal 229

and for such other and further relief as to this court may seem just and proper in the premises.

Dated, New York, August 5th, 1943.

Yours, etc.,

SAUL M. MEADOW,
1450 Broadway
New York, N. Y. 230

JOHN J. FITZGERALD
32 Court Street
Brooklyn.

JULIAN V. CARABBA,
5420—13th Avenue
Brooklyn, N. Y.

Attorneys for Defendant
Sidney Rudish

To: 231

THOMAS CRADOCK HUGHES, Esq.,
Acting District Attorney for Kings County.

232 **Affidavit of Saul M. Meadow, Read in Support of Motion by Defendant Rudish to Make Grand Jury Minutes a Part of Record on Appeal**

COUNTY COURT

KINGS COUNTY

233 PEOPLE OF THE STATE OF NEW YORK,

against

SIDNEY RUDISH, *et al.*,
Defendants.

State of New York }
County of New York } ss.:

234 SAUL M. MEADOW, being duly sworn, deposes and says:

I am one of the Attorneys and assigned counsel for the above named defendant, Sidney Rudish.

That during the course of the trial numerous motions were made with reference to the minutes of the Grand Jury. A motion was made to have the Grand Jury minutes marked for identification, said motion having been granted. (See minutes p. 679)

That a formal written motion was made for an inspection of the Grand Jury minutes on

Affidavit of Saul M. Meadow, Read in Support of Motion by Defendant Rudish to Make Grand Jury Minutes a Part of Record on Appeal 235

July 19th, 1943. That the said motion was denied by the Hon. Samuel S. Leibowitz.

That the Defendant above named was indicted and tried for murder in the First Degree and was convicted of the said charge.

That a motion was made during the trial to dismiss the indictment on the ground that said indictment was found in violation of Section 258 of the Code of Criminal Procedure, said motion having been denied during the trial and later 236 when made in a formal motion on July 19th, 1943 by the Hon. Samuel S. Leibowitz.

That the basis for the said motion to dismiss the indictment was the fact that the only testimony before the Grand Jury with reference to the Defendant Sidney Rudish was the testimony of an accomplice, one David Yellin. That the testimony before the Grand Jury was not sufficient as a matter of law, if uncontradicted, to sustain a conviction of a trial jury.

It is necessary to preserve the Defendant's rights that the minutes of the grand jury, be 237 made a part of the Trial record on appeal so that the Appellate Court will have the proper record before it so as to determine the correctness of the denial of the motion to dismiss the indictment for violation of Section 258 of the Code of Criminal Procedure.

That no previous application has been made for the relief sought herein, except a withdrawn motion similar to this one.

238 *Affidavit of Saul M. Meadow, Read in Support of Motion by Defendant Rudish to Make Grand Jury Minutes a Part of Record on Appeal*

WHEREFORE it is respectfully prayed that an order be entered making the Grand Jury Minutes a part of the trial record on appeal.

SAUL M. MEADOW

Sworn to before me this 5th day of August, 1943.

239 BERNARD WEINSTEIN
Attorney & Counsellor-at-Law
Office & P. O. Address: 1450 B'way, N. Y. C.
N. Y. Co. Clk's No. 12, Reg. No. 4-F-472
Bronx Co. Clk's No. 5, Reg. No. F-44-13
Kings Co. Clk's No. 18, Reg. No. A-4024
Commission expires March 30, 1944

240

241

Order Denying Motion of Defendant Rudish to Make Grand Jury Minutes a Part of Record on Appeal

At a Term of the County Court of Kings County, held at the Courthouse thereof, 120 Schermerhorn St., Borough of Brooklyn, City of New York, on the 11th day of August, 1943.

Present—Hon. SAMUEL S. LEIBOWITZ, 242
County Judge.

Indictment No. 27141

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

SIDNEY RUDISH, *et al.*,
Defendants.

243

A motion having been referred to me by Hon. Louis Goldstein, a County Judge presiding in Part I, on August 9, 1943, for an order directing that the clerk of this Court make the grand jury minutes in the above entitled action part of the trial record on appeal, and after reading and filing the notice of motion dated August 5, 1943, and affidavit of Saul M. Meadow, duly verified August 5, 1943, in support of said motion, and after hearing Saul M. Meadow, Esq.,

244 *Order Denying Motion of Defendant Rudish to Make Grand Jury Minutes a Part of Record on Appeal*

attorney for the defendant, Sidney Rudish, in support of said motion, and Thomas Cradock Hughes, Acting District Attorney of Kings County, by Edward H. Levine, Assistant District Attorney, in opposition thereto, and due deliberation having been had, it is on motion of Thomas Cradock Hughes, Acting District Attorney of Kings,

245 ORDERED, that the said motion be, and the same hereby is, in all respects denied.

Enter:

SAMUEL S. LEIBOWITZ
County Judge.

Granted Aug 11 1943
FRANCIS J. SINNOTT,
Clerk

246

247

Order for Assignment of Counsel for Defendant Malinski to Perfect and Prosecute his Appeal

At a Term of the County Court, Part II thereof, held in and for the County of Kings, at the Courthouse, 120 Schermerhorn Street, in the Borough of Brooklyn, City and State of New York, on the 4th day of August, 1943.

248

Present: Hon. SAMUEL LEIBOWITZ,
County Judge.

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

MORRIS MALINSKI,
Defendant.

249

The above named defendant having been indicted on November 10, 1942, charged with the crime of Murder in the First Degree, and having been convicted thereof and sentenced to be executed according to law,

Now, upon reading and filing the affidavit of said Morris Malinski, sworn to the 26th day of July, 1943, whereby it appears that said defendant is wholly destitute of means to employ coun-

250 *Order for Assignment of Counsel for Defendant Malinski to Perfect and Prosecute his Appeal*

sel or defray the incidental expenses necessary to perfect and prosecute an appeal from the aforesaid judgment of conviction, now, pursuant to the provision of Section 308 of the Code of Criminal Procedure, it is

ORDERED, that Joseph A. Solovei and David F. Price, attorneys and counsellors-at-law, be and they hereby are assigned as counsel for the
251 defendant herein, to perfect and prosecute his appeal from the judgment of conviction heretofore rendered and to render all necessary services in the defense of the defendant herein.

Enter

SAMUEL LEIBOWITZ
County Judge

Granted Aug. 4 1943
FRANCIS J. SINNOTT
Clerk

252

253

Affidavit of Julian V. Carabba for Appointment of Counsel to Perfect and Prosecute the Appeal of Defendant Rudish

COUNTY COURT

COUNTY OF KINGS

Indictment #27141

254

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

SIDNEY RUDISH, *et al.*,
Defendants.

State of New York }
County of Kings } ss:

255

JULIAN V. CARABBA, being duly sworn, deposes and says: That he is an attorney and counsellor-at-law duly licensed to practice as such in this state.

That heretofore and on the 30th day of November, 1942, pursuant to Section 308 of the Code of Criminal Procedure, an order of this Court was made in this proceeding assigning your deponent together with Fred G. Morritt and Saul M. Meadow, Esqs., as counsel to the defendant Sidney Rudish herein, to defend him upon the charge of Murder in the First Degree whereof he stood indicted.

That thereafter and on the 19th day of July, 1943, the above named defendant Sidney Rudish

256 *Affidavit of Julian V. Carabba for Appointment of Counsel to Perfect and Prosecute the Appeal of Defendant Rudish*

was sentenced by this Court pursuant to a judgment of conviction of Murder in the First Degree heretofore rendered by a Jury of this Court. The Court imposed the mandatory sentence of death upon said defendant. Subsequent to the imposition of such sentence, the defendant Sidney Rudish, in open Court, requested the Court to assign counsel to him for the purpose of prosecuting an appeal from the
257 judgment of conviction and the sentence imposed thereunder.

The defendant stated to the Court that he was wholly destitute of means to employ counsel or to defray the incidental expenses of an appeal.

On behalf of the said defendant Sidney Rudish and in view of his urgent request made to this Court for the assignment of counsel as aforesaid, this application is respectfully addressed to this Court for an order designating and assigning counsel to the defendant herein, Sidney Rudish, to prosecute in his behalf, an
258 appeal from the judgment of conviction of murder in the first degree and the sentence imposed thereunder.

For which no previous application has been made, except as aforesaid, by the defendant Sidney Rudish, in person in open Court.

JULIAN V. CARABBA

Sworn to before me this 20th day of July, 1943.

LILLIAN R. KAPLAN
Notary Public:
Kings Co. #350
Comm. expires March 30/1944

259

Order for Assignment of Counsel for Defendant Rudish to Perfect and Prosecute his Appeal

At a Term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 20th day of July, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
Judge of the County Court.

260

Indictment #27141

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

SIDNEY RUDISH, *et al.*,
Defendants.

261

Upon reading and filing the annexed affidavit of Julian V. Carabba, Esq., duly verified the 20th day of July, 1943, and upon all of the proceedings heretofore had herein, it is on motion of Julian V. Carabba, Esq.,

ORDERED that Julian V. Carabba, Esq. of 1420—13th Avenue, Brooklyn and Saul M. Meadow, Esq. of 1450 Broadway, N. Y. C. Attorneys and Counselors at Law be and they

262 *Order for Assignment of Counsel for Defendant Rudish to Perfect and Prosecute his Appeal*

hereby are assigned as counsel to the defendant Sidney Rudish to prosecute an appeal to the Court of Appeals for and on behalf of the said defendant Sidney Rudish from the judgment of conviction of murder in the first degree and sentence imposed thereunder on the 19th day of July, 1943.

Enter

263

SAMUEL S. LEIBOWITZ
County Judge

Granted July 20, 1943
FRANCIS J. SINNOTT
Clerk

264

Amended Order for Assignment of Counsel for Defendant Rudish to Perfect and Prosecute his Appeal 265

At a Term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 28th day of July, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
Judge of the County Court. 266

Indictment #27141

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

SIDNEY RUDISH, *et al.*,
Defendants.

267

Upon reading and filing the affidavit of Julian V. Carabba, Esq., verified the 20th day of July, 1943, and upon all proceedings heretofore had herein, it is on motion of Julian V. Carabba, Esq.,

ORDERED that the Order of this court heretofore made and entered on the 20th day of July, 1943, be and the same is hereby amended to read as follows:

268 *Amended Order for Assignment of Counsel for Defendant Rudish to Perfect and Prosecute his Appeal*

ORDERED that Julian V. Carabba, Esq., of No. 5410—13th Avenue, Brooklyn, N. Y.; (SSL) Saul M. Meadow, Esq., of No. 1450 Broadway, New York City; and Hon. John J. Fitzgerald, of No. 32 Court Street, Brooklyn, N. Y. City, attorneys and counselors at law, be and they hereby are assigned as counsel to the defendant Sidney Rudish to prosecute an appeal to the Court of Appeals for and on in behalf of the
269 said defendant Sidney Rudish from the judgment of conviction of Murder in the first degree and sentence imposed thereunder on the 19th day of July, 1943.

Enter:

SAMUEL S. LEIBOWITZ
County Judge: Kings County

Granted Jul 28 1943
FRANCIS J. SINNOTT
270 Clerk

271

Judgment of Conviction of Defendant Malinski

At a Term of the County Court held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 19th day of July, 1943.

Present: Hon. Samuel S. Leibowitz,
County Judge.

272

27141

The People of the State of New York,

against

Morris Malinski, true name Morris Malinsky

273

Indicted for Murder, First Degree, and convicted thereof, as charged, by the verdict of a jury on the 24th day of June, 1943, without any recommendation of life imprisonment.

Being personally present and sworn says: My true name is Morris Malinsky; I am 24 years of age; I was born in Brooklyn; I reside at 714 Hinsdale Street; I am a helper on truck; I am married; I can read; I have a public school education, grade 8B; I am a Hebrew, irregular attendant; my father is living; I am temperate; I do

274 *Judgment of Conviction of Defendant Malinski*

not use drugs; I have previously been convicted of one felony.

The defendant and his counsel being present and the defendant being asked if he had anything to say why the judgment of the law should not be pronounced against him, and he having nothing to say, the Court pronounced judgment as follows:

WHEREUPON, it is Ordered and Adjudged by
275 tne Court that the said Morris Malinski, true name Morris Malinsky, for the Murder in the First Degree of Leon Fox, whereof he is convicted, be and he hereby is sentenced to the punishment of death and that within ten days from this date the Department of Correction of the City of New York deliver the said Morris Malinski, true name Morris Malinsky, together with a warrant of this Court, to the agent and warden of Sing Sing State Prison at Ossining, where he shall be kept in solitary confinement until the week beginning with Sunday, August 29, 1943, and that upon some day within the week
276 so appointed the agent and Warden of the said Sing Sing Prison at Ossining, shall do execution upon him, the said Morris Malinski, true name Morris Malinsky, in the mode and manner prescribed by law.

A true extract from the minutes.

FRANCIS J. SINNOTT
Clerk.

(Seal)

277

Death Warrant of Defendant Malinski

COUNTY COURT

KINGS COUNTY

27141

THE PEOPLE OF THE STATE OF NEW YORK,

against 278

MORRIS MALINSKI, true name MORRIS MALINSKY

State of New York }
County of Kings } ss:

To the Agent and Warden of Sing Sing State Prison at Ossining, New York:

WHEREAS, at a trial term of the County Court, 279 held in and for the County of Kings on the 14th, 15th, 16th, 17th, 18th, 19th, 21st, 22nd, 23rd and 24th days of June, 1943, the above named Morris Malinski, true name Morris Malinsky, was put on trial for the murder of Leon Fox, committed in the County of Kings on or about the 15th day of February, 1941, and upon said trial the said Morris Malinski, true name Morris Malinsky, having been found guilty of Murder in the First Degree on June 24, 1943, for the killing of the said Leon Fox without any recommendation of life imprisonment, and on the 19th day of July,

280 *Death Warrant of Defendant Malinski*

1943, having been sentenced to be put to death in the manner provided by law on some day in the week beginning with the 29th day of August, 1943;

Now it is hereby ordered that the execution of the said sentence be done upon the said Morris Malinski, true name Morris Malinsky, by you, the said Warden of Sing Sing State Prison at Ossining, New York, in the manner provided by law,
281 on such day in the week beginning on the 29th day of August, 1943, as you shall determine and within the walls of your said prison or inclosure thereto adjoining.

Witness my hand at the Borough of Brooklyn, City of New York, County of Kings aforesaid on the 19th day of July, 1943.

Samuel S. Leibowitz
County Judge of Kings County.

282 Given under my hand and attested by the seal of the said Court this 19th day of July, 1943.

Francis J. Sinnott
(Seal) Clerk.

283

Judgment of Conviction of Defendant Rudish

At a Term of the County Court held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 19th day July, 1943.

Present: Hon. SAMUEL S. LEIBOWITZ,
County Judge.

284

27141

THE PEOPLE OF THE STATE OF NEW YORK,

against

SIDNEY RUDISH

285

Indicted for Murder, First Degree, and convicted thereof, as charged, by the verdict of a jury on the 24th day of June, 1943, without any recommendation of life imprisonment.

Defendant being personally present refused to be sworn or to answer any questions.

The defendant and his counsel being present and the defendant being asked if he had anything to say why the judgment of the law should not be pronounced against him, and he having nothing to say, the Court pronounced judgment as follows:

286 *Judgment of Conviction of Defendant Rudish*

WHEREUPON, it is Ordered and Adjudged by the Court that the said Sidney Rudish, for the murder in the First Degree of Leon Fox, whereof he is convicted, be and he hereby is sentenced to the punishment of death and that within ten days from this date the Department of Correction of the City of New York deliver the said Sidney Rudish, together with a warrant of this Court, to the agent and warden of Sing Sing State Prison at Ossining, where he shall be kept
287 in solitary confinement until the week beginning with Sunday, August 29, 1943, and that upon some day within the week so appointed the agent and warden of the said Sing Sing Prison at Ossining, shall do execution upon him, the said Sidney Rudish, in the mode and manner prescribed by law.

A true extract from the minutes.

FRANCIS J. SINNOTT
Clerk.

(Seal)

288

289

Death Warrant of Defendant Rudish

COUNTY COURT

KINGS COUNTY

27141

THE PEOPLE OF THE STATE OF NEW YORK,

against 290

SIDNEY RUDISH

State of New York }
County of Kings } ss:

To the Agent and Warden of Sing Sing State Prison at Ossining, New York:

WHEREAS, at a trial term of the County Court, 291
held in and for the County of Kings on the 14th, 15th, 16th, 17th, 18th, 19th, 21st, 22nd, 23rd and 24th days of June, 1943, the above named Sidney Rudish was put upon his trial for the murder of Leon Fox, committed in the County of Kings on or about the 15th day of February, 1941, and upon said trial the said Sidney Rudish having been found guilty of Murder in the First Degree on June 24, 1943, for the killing of the said Leon Fox without any recommendation of life imprisonment, and on the 19th day of July, 1943, having been sentenced to be put to death in the

292 *Death Warrant of Defendant Rudish*

manner provided by law on some day in the week beginning with the 29th day of August, 1943;

Now it is hereby ordered that the execution of the said sentence be done upon the said Sidney Rudish by you, the said Warden of Sing Sing State Prison at Ossining, New York, in the manner provided by law, on such day in the week beginning on the 29th day of August, 1943, as
293 you shall determine and within the walls of your said prison or inclosure thereto adjoining.

Witness my hand at the Borough of Brooklyn, City of New York, County of Kings aforesaid on the 19th day of July, 1943.

Samuel S. Leibowitz
County Judge of Kings County.

Given under my hand and attested by the seal of the said Court this 19th day of July, 1943.

294 Francis J. Sinnott
(Seal) Clerk.

295

Case and Exceptions

COUNTY COURT OF THE COUNTY OF KINGS

PART 2

Before—Hon. SAMUEL S. LEIBOWITZ,
County Judge, and a Special Jury.

THE PEOPLE OF THE STATE OF NEW YORK

against

296

MORRIS MALINSKI, SIDNEY RUDISH and JOSEPH INDOVINO,

Defendants.

Indictment No. 27141. Murder, First Degree.

Brooklyn, N. Y., June 14, 1943.

APPEARANCES:

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For the People: JAMES A. McGOUGH, Esq., Assistant District Attorney.
For the Defendant Malinski: Jos. A. SOLOVEI, Esq.
For the Defendant Sidney Rudish: Messrs. JULIAN V. CARABBA, FRED G. MORRITT and SAUL M. MEADOW.
For the Defendant Joseph Indovino: Messrs. WILLIAM F. X. GEOGHAN, MICHAEL LONGO and ABRAHAM MULTER.

RALPH E. ROBERTS,
LOUIS LEHMAN,
Official Stenographers.

298 *Colloquy*

(A jury of twelve was impaneled and sworn and two alternates were selected and sworn by direction of the Court.

The jury was thus completed at 11:55 P. M.)

The Court: Gentlemen of the jury, we are about to take a recess until tomorrow morning at 10:30 o'clock. I am going to give you certain instructions which will not be as elaborate henceforth as they are now. I give you these in-
299 structions because the law requires me so to do. They are as follows: Please do not discuss this case among yourselves in any shape, form or manner. Please follow these instructions literally. Make no comment about the respective counsel in the case or about any one connected with the Court or about the District Attorney; and, as the case progresses, make no comments about the witnesses. Do not tell your neighbor what you thought of so-and-so on the witness stand, or what you thought of so-and-so, as a lawyer. Do not do that even when you are alone
300 in your private rooms; because if it should come to my ears (and it will) a very unpleasant situation may arise. Do not permit any one else to speak to you about this case, or to discuss it in your presence. You may talk about everything else under the sun but this particular case or any feature of it. You are required to keep your minds open. You are judges now, cloaked with the responsibilities of judges; and, acting as judges, you must maintain a judicial attitude. A good judge waits until he hears everything that need be said about a subject before he makes up his mind. In other words, he reserves

decision, and your decision should be reserved until the last word has been said in the case by the Court, and you have retired into the sanctity of your jury room. I say again, you must keep an open mind. Do not form or express any opinion as to the guilt or innocence of these defendants on trial or either of them, or any of them. Now, you shall have access to the daily press, but any article pertaining to this case will be deleted by the court officials. I am going to keep you altogether during the balance of 302
this trial. Do not charge that to the lawyers for the defense, and do not charge that to the District Attorney. Neither of them have had anything to do with it. Charge that up to me, if you feel aggrieved, because you are being kept together in this uncomfortable weather; you blame it on the Judge. Just hold it against me. I feel that in the interest of justice, and in the sound exercise of my discretion, that it is best that you be kept together during the course of this particular trial; but I shall try to expedite the case as much as I can, so that you will not be 303
unduly delayed in the return to your homes, and to your daily affairs. We shall not work night sessions unless it becomes absolutely necessary, but we shall keep at a steady pace, and I do hope to have you out as soon as possible. I believe these are about all the instructions that are necessary, unless counsel or the District Attorney have any additional ones in mind.

Mr. Meadow: I understood your Honor to say during the noon recess that they were going to be in Coney Island, and I think that they should not pass the scene of the accident.

304 *Colloquy*

The Court: I have already thought of that. I have already made arrangements with Captain Gannon that that should not be done. These men will be transported through Neptune Avenue; from Ocean Parkway to Neptune Avenue, and to the Half Moon Hotel, and under no circumstances to go along Surf Avenue, but to go through the back way.

Mr. Meadow: That is satisfactory.

The Court: Gentlemen, every bit of comfort
305 that can possibly be given you will be given you. We will try to make your stay as comfortable and as pleasant and as nice as possible and if you have anything that really bothers you, if it is at all within reason,—do not ask anything that is unreasonable—I am sure you will find Captain Gannon and his men courteous and considerate, and attentive to your wants. I will see you again tomorrow morning at 10:30 o'clock, gentlemen. You may retire.

(The jury retires from the court-room.)

306 The Court: Defendants will be remanded.

(Whereupon an adjournment was taken until June 15, 1943, at 10:30 o'clock A. M.)

AFTER RECESS, 10:30 O'CLOCK A. M.

Brooklyn, N. Y., June 15, 1943.

TRIAL RESUMED.

Mr. Geoghan: On behalf of Indovino and Rudish, both of whom have assigned counsel, I move that we be supplied with over-night copy of the minutes.

The Court: The motion will be granted. The Court will order daily copy for the Court, for counsel for the defendant Indovino, and counsel for the defendant Rudish. I take it the District Attorney desires daily copy? 308

Mr. McGough: I would like to have daily copy, Judge.

The Court: Very well.

Mr. McGough opened to the jury for the People as follows:

Mr. McGough: May it please your Honor, Gentlemen of the Defense, Mr. Foreman and Gentlemen of the Jury: 309

At this time the law demands and requires that the District Attorney must make a statement as to what he intends to prove with respect to the charges against these three defendants.

You know by this time, gentlemen, that there are three men on trial, whose names are Morris Malinski, Sidney Rudish, Joseph Indovino. The indictment in this case is very brief and I will at this time read it to you. It was filed on the 10th of November, 1942 and it reads as follows:

"County Court of the County of Kings. The People of the State of New York, Plaintiffs,

against Morris Malinski, Sidney Rudish and Joseph Indovino, defendants. The Grand Jury of the County of Kings, by this indictment, accuse the defendants of the crime of murder in the first degree, committed as follows: The defendants, on or about February 15th, 1941, in the County of Kings, acting in concert with Abraham Beitler, deceased, willfully, feloniously and of malice aforethought, shot and killed Leon Fox with a pistol. Signed, Thomas Cradock-
311 Hughes, Acting District Attorney."

Now, gentlemen, to prove the allegations of this indictment against these defendants, I intend to call witnesses here who will testify that on Saturday night, the 15th day of February, 1941, there was a theater known as the Loew's Coney Island Theater, located on Stillwell Avenue and Surf Avenue, in the Borough of Brooklyn, County of Kings; that a man named Herman Dolinsky, the manager of the theater, shortly before the hour of 11 p. m. on that particular night, assembled part of the receipts that the
312 theater had taken at the cash desk that day, which amounted to $770: $700 in bills and $70 in quarters. The testimony will show that there were seven rolls of quarters, each roll containing ten dollars. That a patrolman attached to the 60th Precinct, which is known as the Coney Island Precinct, was present, whose name was Leon Fox. It was Fox's duty to escort Mr. Dolinsky down about two blocks along Surf Avenue to West 12th Street, where Dolinsky's duty was to deposit the $770 in a night depository of the Brooklyn Trust Company. Testimony will show that as they left the theater they

proceeded along the north side of Surf Avenue, and as they reached West 12th Street they sort of crossed at an angle, and as they touched the curbstone on that particular corner Dolinsky saw an automobile, which will be described in detail here in this case. The lights of that automobile were out. The right front door of that automobile was open, and as they proceeded down West 12th Street, a man leapt from the automobile, brushed Dolinsky to one side, and immediately fired a series of shots at the policeman. 314 That as Dolinsky was running down the street he was yelling "Help! Police!" when some voice coming from the position where the policeman was and this man who was firing, said, "Drop that bag or I will drop you"; whereupon Dolinsky threw the bag towards the man that made the outburst, and the man picked the same up and jumped back into the car, and then with a burst of speed that automobile dashed across Surf Avenue, travelling in a northbound direction towards the street known as Neptune Avenue.

315 Gentlemen, I want to make a very frank statement at this time. The People in this case do not have any eye witnesses who were at this particular spot; but I intend to offer complete and detailed evidence which at the proper time will convince you of the guilt of each and every one of these three men.

I have witnesses to show that there were two shots fired, and there was a burst of flame coming from the place where these shots had emanated from. That particular man, who was on a lawful mission in Coney Island, travelled

two blocks in his car and made known that fact to two police officers who will be called here as witnesses. They were at the theater which is two blocks west of the occurrence that I have just mentioned. Those two police officers swung their radio patrol car back and they reached the scene, and when they arrived there they saw Patrolman Fox lying on the ground.

Dolinsky will testify that as the car shot across Surf Avenue on its get-away, Patrolman Fox,
317 who was lying in a supine position on his back, fired six shots after the automobile.

There will be testimony here that the first two officers, Patrolman Rabbitt and Sergeant Bremeier rushed Fox to an automobile and took him up to the Coney Island Hospital.

This occurred, gentlemen, just a short time after 11 o'clock, and about the hour of 12:07 that particular night, Patrolman Fox, with a wound through-and-through the upper left portion of his chest, and another wound on the other side which did not go through—and the bullet of
318 which the Medical Examiner will testify he recovered—expired there at the hospital.

This case, gentlemen, went unsolved for a period of about twenty months. Sometime about October 27th, the police officers and detectives assigned to this particular borough obtained some information, and I intend to offer some proof here to show that about three or four nights before this particular occurrence the defendant Indovino, over in New York, met a witness who will testify here, and said he had something good in Coney Island, a stickup of a motion picture theater, where you would get at

least a "Grand"—a common word for a thousand dollars—and that the policeman would put up without any trouble and that the job just could be done without any trouble at all. He told these people he lived in Coney Island at that time, and because he was known down there he could not go with them, but he was glad to give them the job or the information that these other men wanted.

I am going to show you that there were three men in the car. I might say there were two in 320
the front, one driving, and one alongside of him, and there was another figure crouching down in the back of that car. I intend to show here by testimony elicited from witnesses that that car after going up West 12th Street turned left on Neptune Avenue and when it got to Stillwell Avenue turned left and was parked at a spot 2844 Stillwell Avenue. I intend to offer some engineering testimony here, with the permission of the Court and the consent of counsel, that will be of some service to show the general layout and to facilitate the handling of the testimony, 321
for the benefit of the Court and jury. I intend to offer some photographs that depict this particular scene as it was on the night in question.

I intend to offer testimony that a short time after this a patrolman named Carboy, who knew Patrolman Fox, found this particular automobile down at that place on Stillwell Avenue, and that as he made an examination of it he found the ignition wires were twisted, as some of you may know, can be done—the ignition was "jumped" so to speak.

He will testify that as he examined the car he

found a hat right underneath the car. I intend to offer testimony here that Rudish was driving that car—Rudish was the driver, Beitler was in the front seat, and the defendant Malinski was in the back seat. Three of them visited the scene and perpetrated this offense, and Indovino was the tipster. And if you follow the law given you by his Honor, the Judge, you will know that the People have the right to proceed against all three defendants right here on the charge of murder in the first degree.

I intend to show that Rudish was in the vicinity, the general vicinity of Pine and Fulton Streets, Borough of Brooklyn, County of Kings; that he was out there to contact a man by the name of Sonenblick, from whom he wanted to get a job for a friend of his; that when he was out in the neighborhood he found that he had left the address of Sonenblick at home, and he endeavored to locate the man that gave him the address, in New York on the telephone; that there was a conceived, planned, conspiracy between these defendants right here on trial and the dead man Beitler, that they were to go at nine o'clock that night, that Rudish was to supply the car, that Beitler was to supply the guns, two 38 and two 45 calibre guns; and that Malinski was to go along.

I intend to show that this automobile was taken from the corner of Pine and Fulton Streets by Rudish, when he went out to find Sonenblick and could not find him, and when he found that time was running against him, and he was in danger of being late for the appointment in the lower east side of Manhattan, and he took this

Ford 1936, blue, convertible coupe automobile, with a cloth top.

I intend to show that a short time after this car was recovered it was identified by all the persons who were at that particular location. They identified it as the car that left that scene with a burst of speed and went off, as I said, in a northerly direction up West 12th Street.

The Medical Examiner will testify that there were two wounds: One a through-and-through wound in the patrolman's chest, and the other one in the lower right hand portion of the abdomen. He will tell you that the cause of death was two gun shot wounds.

I intend to show that after this particular occurrence, the defendant Malinski and the deceased, Beitler, left the car and proceeded to New York by taxicab; that the defendant Rudish left the car and went up on the station of the B.M.T. and proceeded to New York by train, and that while he was up on the platform, by his own words and his own admissions, he said he heard all the sirens of the Police Department blowing around Coney Island, but he went off to New York. And when he got to New York he visited a certain place where there was a card game going on, and he called out a certain individual whom I am going to call here as a witness, and he told him the whole thing, told him about the fireworks, told him how they shot the cop, told him how the cop went down and how the cop fired the bullets after the fleeing car.

I intend to show by another witness that on the following day, which was Sunday, this same defendant Rudish told the same story to another

328 one of his cronies, another one of the pals of all of the four men mentioned here—told the story in detail.

And at the particular time, gentlemen, I intend to show by competent, legal proof here, that Malinski, when he was arrested, on the 27th day of October, he made a full, voluntary confession, explaining in detail everything that was done. I intend to show that after he made that statement
329 he took the police officers right down to the scene and told them how he went about it. At that particular time he told the police that the hat that was found at the scene was his hat; that he had obtained it a short time before from a young man named Levine, who is now in the Army, but whose present whereabouts I will be able to explain here. He initialed the hat and made a full disclosure.

This, gentlemen, is what I intend to prove, in brief. I do not intend to go into details. I would much prefer to have you hear the testi-
330 mony as it flows from the lips of the witnesses.

But based on what you will hear today and the succeeding days, I have no doubt in my mind at all that you will have little difficulty in arriving at a true and fair verdict, a verdict of murder in the first degree as against all three defendants on trial.

Mr. Solovei opened to the jury for the defendant Malinski as follows:

Mr. Solovei: May it please your Honor, Mr. McGough, Associate Counsel, and Gentlemen of the Jury:

Opening Statement on Behalf of Defendant Malinski 331

I am not going to burden you at this time with any lengthy opening. I am just going to ask you gentlemen at this time to keep your minds open. I am going to ask you gentlemen not to make any hasty decision here until the entire case is presented to you for your consideration.

I have listened attentively to the District Attorney's remarks, and we intend to refute the statements made by the District Attorney. We will show you under what circumstances Malinski 332
had to say something to the police, and under what circumstances he did make a statement that has been called a confession; and after you have listened to what we will present to you here for your consideration, I think, gentlemen, you will have no difficulty at all in coming to the conclusion that Malinski had nothing at all to do with this case; that he did not participate in the crime directly or indirectly; that he did not aid and abet one Beitler, as alleged in this indictment, in the killing of one Fox, on the 15th day of February, 1941; that he was not at the scene 333
of the crime, had nothing to do with the crime. And I intend to show you, gentlemen here, that from the time that he left the Elmira Reformatory, to which I told you very frankly he had been committed for having previously committed a crime—up to the day of his arrest, that he worked every day; that he never was without employment, and that at the time he was arrested, about 7:15 a.m., that he was on his way to work, and had a very substantial job, receiving a very good salary—that the young man worked at gainful employment, and had nothing at all to do with this crime, did not participate in the crime, and knows nothing at all about it.

334 *Opening Statement on Behalf of Defendant Rudish*

So I just ask you, gentlemen, at this time, to keep your minds open and wait until you listen to all this testimony that will be adduced here, and determine for yourselves whether any statement made by Malinski was a voluntary statement or whether or not it was made in violation of the law, as the Court will charge you on the law later on.

335 Mr. Carabba opens to the jury for the defendants Rudish as follows:

Mr. Carabba: Mr. McGough, your Honor, Gentlemen of the jury: On behalf of the defendant Rudish, I am going to say to you at this time and I ask to keep your minds open, arrive at no conclusion until all of the evidence is in on both sides. We expect to show to your satisfaction that the defendant Rudish never knew Indovino on the night of February 15, 1941; the first time that we ever knew that Indovino existed was at the arrest of Indovino and the arrest of Rudish.

336 You have probably heard that the arrest in this case was not made until approximately twenty months after the commission of the crime. We are charged in this indictment with acting in concert with one Beitler, on the evening of February 15, 1941. We say we were not there, we know nothing about it, we did not know Indovino, never met him until after his arrest. With that in mind I ask you to form no opinion about this case until all of the evidence is in on both sides.

Mr. Geoghan opened to the jury for the defendant Indovino as follows:

Opening Statement on Behalf of Defendant Indovino 337

Mr. Geoghan: First of all, I have a preliminary motion. I move to dismiss the indictment on behalf of Indovino, on the District Attorney's opening. He stated here that three or four days before this crime was committed Indovino met a fellow and I understood him to say that he said, "There is something soft or easy in Coney Island." That he stopped there. If that is all he is to prove in this case, there is no case against Indovino, and I make that motion at this 338
time.

The Court: Motion denied.

Mr. Geoghan: Exception.

Mr. Geoghan: If your Honor please, Mr. Foreman and Gentlemen of the jury:

I concur in what Mr. Carabba said with regard to Indovino and Rudish. The same testimony will be given on behalf of Indovino, that they never knew each other, never met each other, never saw each other until after they were arrested; and the arrest of Indovino was made on October 24th, 1942, the crime having been 339
committed on February 15th, 1941.

Now, like Rudish, according to Mr. Carabba, Indovino has as much participation in this robbery as any of you gentlemen sitting in the jury at the present time, as we shall prove to you—and we are not holding from you just what the proof is on behalf of Indovino, nor did we hold it from the District Attorney. We let him know two weeks ago what our proof was.

You know, if I were to ask you suddenly, gentlemen, where you were on February 15th, 1941, I wager not one of you could tell me, unless perchance you kept a daily diary, and that

340 does not seem to be as customary in these days as it was when we were boys. But sometimes Providence steps in where a man's life is at stake or his liberty is at stake, and supplies the information. We happen to know and Indovino happens to know just exactly where he was on February 15th, 1941, and so do the witnesses whom we shall call in his behalf. You know sometimes you can figure a date because of an
341 event that makes a deep impression on your minds, an event of a great amount of importance. The event which occurred on February 15th, 1941, which makes February 15th, 1941 stand out in bold relief as far as Mr. Indovino is concerned, he is going to tell you and his witnesses will corroborate him at that time. We have already told this to the District Attorney. We have served him with our Bill of Particulars.

At six o'clock on the night of February 15th, Indovino visited, as was his nightly custom, his fiancee—then his fiancee and now his wife. She
342 lived at that time at 2118 Ocean Parkway, next door to the Ambrosia family, who lived at 2120 Ocean Parkway. He went there at six o'clock. He was not working on Saturdays, that was his weekly custom. Saturday was a free day for him. And he was regularly employed at that time, regularly employed right up to and including the day of his arrest. We are going to show you that he arrived there at six o'clock in the evening, spent the entire evening with his fiancee from six o'clock in the evening, when he arrived, until 1:30 in the morning. And he knows it was 1:30 in the morning when he left (that was Sunday morning, February 16th) be-

343

cause he always stayed with his fiancee as long as he could, and that was until the last bus left at Avenue U, I think it is, and Ocean Parkway. It was only directly across the street from Miss Skoura's house. Miss Skoura was the fiancee. He would wait on the porch until he saw that bus come along. That bus left ther every morning at half past one. The family next door saw him on the porch at six o'clock in the evening, and they remembered the day because they were 344
going over to attend a wedding rehearsal of a niece, of a Miss Angelotti, who will testify here. She came over to Mrs. Ambrosio's house, and she and Mrs. Ambrosio, at eight o'clock, left for the rehearsal of this wedding, that took place the next day at Our Lady of Grace Church. They returned from the rehearsal around midnight, and seeing Indovino and Miss Skoura on the porch, as they had seen them before they left, at eight o'clock, they went and remained there with them until about one o'clock and then they returned. We will produce all that proof here, 345
gentlemen, and we will show you in addition to that that he knew Malinski—never by name—used to see him up in Elmira Reformatory—never was chummy with him, had nothing to do with him in connection with this crime. As for this man Beitler, whose name has been mentioned, as far as he knows, he never knew him in his life.

While we don't have to establish our innocence, and they have to establish his guilt, we are going to offer that affirmative proof on the record here and leave it to you, gentlemen, to determine as to whether or not the District Attorney

and the police have a guilty man in this fellow, Indovino.

We ask you to reserve decision until the evidence is all in, and then give us a fair and just verdict.

Mr. Meadow: I would like to move for the exclusion of witnesses.

The Court: All witnesses are excluded.

The Clerk: All witnesses in the case on trial
347 will remain outside. All witnesses wait in the corridor until they are called inside to testify. All witnesses on both sides go out. The surveyor may remain. The doctor may remain.

HENRY FOX, residing at 2243 Valentine Avenue, Bronx, called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

348 Q. What is your name, please? A. Henry Fox.

Q. Did you have a brother named Leon Fox? A. Yes.

Q. When did Leon Fox die, please? A. February 16th in the midnight—I think the 15th at midnight.

Q. What year? A. 1941.

Q. What was your brother's occupation, please? A. Patrolman.

Q. Member of the Police Department of the City of New York? A. Right.

Q. How long had he been a member of the Police Department? A. About thirteen years.

Q. At the time of his death, where was he stationed, if you know? A. Coney Island station.

Q. Some time on Sunday, the 16th of February, 1941, did you see your brother Leon Fox? A. Yes.

Q. At that time was he dead or was he alive? A. Dead.

Q. Where did you see his body? A. In the morgue.

Q. At that time and place did you see the Medical Examiner Dr. Marten? A. I did. 350

Q. Is this the doctor sitting here in court (indicating)? A. Yes.

Q. Did you identify the dead body of Leon Fox, your brother, to Dr. Marten? A. I did.

Mr. Geoghan: No questions.
Mr. Carabba: No questions.
Mr. Solovei: No questions.

M. EDWARD MARTEN, residing at 152 Lenox Road, Brooklyn, called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows: 351

Direct examination by Mr. McGough:

Q. What is your official position, please? A. I am the Deputy Chief Medical Examiner of the City of New York.

Q. By profession are you a duly licensed, registered medical doctor here in the State of New York? A. Yes, sir.

352 *M. Edward Marten—For People—Direct*

Q. Now, on or about the 16th day of February, 1941, did you perform an autopsy on the body of one Leon Fox? A. I did, yes, sir.

Q. Before you commenced the autopsy did anyone identify the body? A. Yes, sir; the last witness identified it, his brother.

Q. That would be his brother Henry Fox? A. That is correct, yes, sir.

Q. Where was the autopsy performed, please? A. At the county morgue, on the 16th day of
353 February, 1941.

Q. Will you tell this Court and jury what your autopsy revealed? A. The autopsy revealed a male adult about 34. He was a white man and measured five feet eight inches in height. He was rather stockily built and weighed approximately 160 pounds. He had the following wounds on him, caused by a bullet. One was situated in the upper, right anterior chest wall, two and a half inches to the right of the midline and two inches below the suprasternal notch, or two inches below where your collar button is on your shirt, at the top there (indicating)—
354 two and a half to the right and two inches below; which would make a position about where my finger is. The tract of this bullet was traced from before backward and slightly inward, and it was found to egress or come out of the body in the back on the right side, in the posterior chest wall, about 52 inches above the level of the right heel, the level of the third or fourth dorsal vertebra, meaning the little spools of bone that constitute the vertebra—at a level 52 inches above the heel. In its path it passed through the upper lobe of the right lung, causing a very

considerable hemorrhage, there being over two quarts of blood in the right chest cavity. In addition to this bullet there was one in the chest wall almost at the very margin of the ribs (showing), three inches above the navel and four and a half inches to the left of the midline. This passed backward, passing through the chest wall at its margin, and perforated the bowel and the spleen; and was found just to the left of the fourth dorsal vertebra—lumbar vertebra, I should say—from where it was recovered. 356

Those are the only wounds on the man. The cause of death was the gunshot which caused the hemorrhage by perforating the lung. I have the bullet here that I recovered from the abdominal cavity (producing envelope).

Q. Did you examine the bullet, Doctor? A. Yes.

Q. Can you tell us what calibre it is, if you know? A. It appears to be .38 calibre.

Q. Was there any bullet found in connection with the wound that you described as being on the upper or— A. No; that was a through-and-through bullet wound. 357

Q. So that there were three wounds, two of entrance and one of exit; is that correct? A. That is quite correct.

Mr. McGough: I would like to have that bullet marked in evidence, may it please the Court.

Mr. Geoghan: I object that this, from the doctor's testimony, is not the fatal bullet.

The Court: Objection overruled.

Mr. Geoghan: Exception.

358 *M. Edward Marten—For People—Cross*

By the Court:

Q. That bullet you took out of the body of Patrolman Fox? A. Yes.

Q. In the morgue, when you performed the autopsy on him, is that right? A. Yes, sir.

Q. Was the wound a fresh wound, that is, the wound in the patrolman? A. Yes, sir.

Q. Recent wound? A. Yes, sir.

359 The Court: Objection overruled. Mark it.

(Marked People's Exhibit No. 1.)

Cross-examination by Mr. Geoghan:

Q. Did I understand you to say that this bullet that was offered in evidence was a bullet that caused the death of Leon Fox? A. I did not say that.

Q. Will you say that it is the bullet that did not cause his death? A. I will not say that either.

360 Q. Neither would you say it caused his death? A. Well, not just yes or no. I mean I cannot answer that without an explanation.

Q. I will take the explanation. A. I believe that that bullet could certainly have caused the death of the individual.

Q. But not Leon Fox? A. Of the man from whom I took it. That could have been the fatal wound. The reason I referred to the bullet No. 1 as being the cause was simply that it was the more likely of the two; that it caused the greatest injury. It does not rule out that this could not

have been a competent producing cause of his death.

Q. And your testimony only goes to the extent that it might have, but not that it did; is that right? A. There were two bullets.

Q. Two bullet wounds? A. Two bullet wounds —two bullets causing injury. I do believe that either one of those wounds was a competent producing cause of death. The reason I referred to the largest wound was simply because there was —I found at least 2500 cubic centimeters of blood 362
in the chest.

Q. That was wound No. 1? A. Wound No. 1 in terms for description's sake only; that is, this is a very large quantity of lost blood.

Q. That in your opinion, as I understand, is what caused the death of Leon Fox? A. That certainly was a competent producing cause of death, yes, sir.

Q. But you do not produce the bullet that caused that wound, is that correct? A. Yes, sir. That passed out. So that is correct, I have not that bullet.

363

Mr. Geoghan: I still press my objection.
The Court: Objection overruled.
Mr. Geoghan: Exception.

Cross-examination by Mr. Meadow:

Q. Can you tell us how many inches from the lower portion of the body the wound in the back of the deceased was? A. That question does not mean anything to me. It is not clear to me.

Q. Give us the exact location—

The Court: What is the purpose of this cross-examination?

Mr. Meadow: I want to show—

The Court: What is the purpose of it?

Mr. Meadow: I want to show how the bullet traveled, the one that went through the chest cavity. I want to show how that bullet traveled, and that is all. I have something in mind, your Honor.

The Court: All right.

365 A. You refer to the lower part of the body. I don't know what that means.

Q. Just tell us where the bullet that went through the abdomen came out through the back? A. It did not come out through the back.

Q. Doctor, did you testify on direct examination that a bullet went through the abdomen and went completely through the body? A. I did not. You did not listen.

Q. I did not hear. I was listening. Will you tell us what happened to the bullet that went into the abdomen. Is that the bullet that you took
366 out of the body? A. That is correct; yes, sir.

By the Court:

Q. That is the one that ripped— A. The bowel and the spleen.

Q. Ripped his bowel and ripped his spleen? A. That is correct.

Mr. Meadow: I did not hear.

By Mr. Meadow:

Q. Then will you tell us where the other bullet

came out of the body in the back? A. 52—may I refer to my notes? I will give you a very accurate location. I think it was 52½ inches above the right heel, and about one and a half inches to the right of the midline. I will check against that right here (referring to paper). In other words, I stated that bullet labeled No. 1, as having gone into the chest at a point that was two and a half inches to the right of the midline and two and a half inches below where your collar-button is. That is the way I referred to it. 368
That would be the position here (indicating).

Q. That bullet stayed in the body? A. No; it did not. Do you want me to finish this, or to put another question?

Q. Yes. A. Shall I finish this?

Q. Yes; just tell us where the bullet came out? A. That was the entrance wound I just gave you. The tract of this, referring to No. 1, was from before backward, almost horizontal. In its course it entered the chest wall at the second interspace, meaning the space between the second and third rib—perforated the upper lobe of the right lung, and emerged from the space 369
between the second and third ribs posteriorly—that is, in the back—making its exit from the chest wall at a point indicated as being 52 and one-half inches above the level of the right heel.

370 *Anthony O. DeSario—For People—Direct*

ANTHONY O. DESARIO, residing at 1860 52nd Street, Brooklyn, called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

The Court: Have you gentlemen examined this map or diagram?

Mr. Geoghan: We have a copy of it.

The Court: Have you looked at it?

Mr. Carabba: Yes; we have.

371 Mr. McGough: I would like to have the record note that I have furnished counsel with a copy of the diagram.

Mr. Geoghan: I just made that statement.

The Court: Is the map all right?

Mr. Carabba: We understand it is a copy. We appreciate having a copy.

Direct examination by Mr. McGough:

Q. Mr. DeSario, you are an engineer connected with the Police Department of the City of New
372 York? A. I am.

Q. At my request did you make a survey or diagram of the streets at Surf Avenue and West 12th Street here in the Borough of Brooklyn, County of Kings? A. I did.

Q. Did you bring the survey or blueprint with you here today? A. I did.

Q. Is this the blueprint, please (showing)? A. It is.

Mr. McGough: May I offer it in evidence at this time.

Mr. Geoghan: No objection for Indovino.

Mr. Carabba: No objection on behalf of Rudish.

The Court: There is no objection, I take it, from any of the counsel. The exhibit will be marked People's Exhibit 2.

(So marked.)

By Mr. McGough:

Q. Now, Mr. DeSario, to help us out, please, 374
will you take a pointer and explain the survey now marked People's Exhibit 2. Explain the survey, please. A. We have a plan showing Surf Avenue from West 15th Street to West 12th Street, north to Neptune Avenue. This is a location plan showing the location of various buildings on Surf Avenue between West 15th Street and West 12th Street.

The Court: May I, for the sake of clarity, Mr. District Attorney, ask a question or two, so that we can get this location firmly fixed in our minds? 375

Mr. McGough: Yes.

The Court: I suppose everybody knows Surf Avenue in Coney Island.

By the Court:

Q. When you are coming down through Ocean Parkway, entering Surf Avenue, going towards Sea Gate, going towards Sea Gate, the street to the right of Surf Avenue would be Neptune Avenue, is that correct? A. That is correct.

376 *Anthony O. DeSario—For People—Direct*

Q. That is Mermaid Avenue that intersects there at Stillwell Avenue? A. Yes.

Q. And is also a parallel street to Surf Avenue? A. Yes.

Q. To the left would be the boardwalk and the ocean? A. That is correct.

Q. Give us the points of the compass as we are traveling towards Sea Gate. Which way would you be going? A. West.

Q. If we turned in the opposite direction and
377 went towards Eastern Parkway, which way would we be going? A. Going east.

Q. Towards Neptune Avenue is north? A. That is north.

Q. Towards the ocean is south? A. South.

The Court: All right.

By Mr. McGough:

Q. Now, on your left you indicated the location of all those streets that you mentioned. Right? A. That is correct.

378 Q. And will you tell us, please, describe what is on the right side of the survey? What intersection is that? A. That is a plan of Surf Avenue and West 12th Street, showing the four corners, the street lights, trolley poles, traffic signals, fire hydrants, and on the other side street lights, trolley poles, hydrants, mail box, and the dimensions of the street, and shows the trolley tracks running along Surf Avenue. On the southeast corner we see a building of the Brooklyn Trust Company. That is the only building we have marked. This plan is drawn to a scale of one inch equals ten feet.

Q. Will you show, please, on the location plan, exactly where the intersection would be? A. Surf Avenue and 12th Street on the location plan—and West 12th Street, rather, here, right here (indicating).

Q. What is the scale of this survey? A. The scale of the location plan is one inch equals fifty feet; that is, this large plan.

380

HERMAN M. DOLINSKY, residing at 845 Prospect Place, Brooklyn, called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. What is your occupation, Mr. Dolinsky, please? A. Manager for Loew's theater.

Q. On February 15, 1941, what theater were you connected with? A. Loew's Coney Island Theater.

381

Q. Where is it located, please? A. That is at 1301 Surf Avenue.

Q. Would that be on the corner of Stillwell and Surf Avenue? A. Surf and Stillwell on the corner.

Q. Borough of Brooklyn, County of Kings? A. Yes.

Q. How long have you been with the Loew's theater? A. Over thirty years.

Q. Do you recall the night of Saturday the 15th day of February, 1941? A. I do.

Q. Where were you at about the hour of about eleven at night? A. On my way to the bank.

382 *Herman M. Dolinsky—For People—Direct*

Q. Were you accompanied by anybody? A. Officer Leon Fox.

Q. How long had you known Fox before that? A. I should judge about six years.

Q. What bank, please, were you on your way to? A. Brooklyn Trust.

Q. Where is that located? A. That is on 12th Street and Surf.

Q. Before leaving the theater to go to the bank did you have occasion to make up any money?

383 A. I did.

Q. Please tell us what if anything you did at the theater in that respect? A. Put it into the burlap bag, seven hundred dollars in bills and seven rolls of quarters, ten dollars each.

Q. When you went to the bank did you have that money with you? A. I did.

Q. Tell the Court and jury, Mr. Dolinsky, please, what route you took when you left the theater to go to the bank? A. In leaving the theater, that is, from 14th Street towards 12th, the officer was on my right side, or the curb side.

384 By the Court:

Q. Was he in uniform? A. In uniform. I was towards the building end. We were walking on the surf side, that is towards 12th Street.

By Mr. McGough:

Q. When you say surf side, you mean the water side or Surf Avenue? A. Surf Avenue.

Q. On which side, north or south?

By the Court:

Q. On the side where the ocean is or on the side where Neptune Avenue is? A. Where Neptune is.

By Mr. McGough:

Q. That would be the north side? A. That would be the north side, the north side. We walked as far as 12th Street, then we turned across here—what would you call it?—catercornered—towards 12th. On crossing I observed a car about what we would call about second parking. There was one door open on the car. 386

Q. Do you mean the auto was away from the curb? A. Away from the curb, yes. It was facing Surf Avenue away from what we call the boardwalk. One door was open. The lights were out on the car, and as we passed a man leapt out of the car, brushed me so I fell forward—that gave me a running position—and leapt at the cop.

Q. Did you see or hear anything at that moment? A. I did. 387

Q. Tell us, please? A. Three shots I heard; I heard three shots.

Q. Did you at that moment see the officer? A. In turning back I seen the officer fall.

Q. Did you hear any voices at that time? A. Just inarticulate, some grumbling sound from the man that done the firing.

Q. Was anything said to you immediately thereafter? A. Yes; as I was running I was ordered to drop the bag or I would be dropped.

Q. Tell us the words you heard. A. "Drop the bag or I will drop you."

388 *Herman M. Dolinsky—For People—Direct*

Mr. Solovei: I object to this line of testimony on the ground it is not binding on the defendant Malinski

The Court: At this time you cannot tell.

Mr. Solovei: However, my objection I press and I ask for a ruling.

The Court: Objection overruled.

Mr. Solovei: Exception.

The Court: I do not hold it is binding, but we have to take the testimony in se-

389 quence.

Mr. Meadow: The defendant Rudish joins in that objection.

The Court: I will take the testimony subject to a motion to strike out in the event it is not connected with each of these defendants, or with the defendant in question. You gentlemen will bear in mind to make such a motion. In the event that you do not make a motion the Court will conclude that you do not desire to make the motion. Proceed.

390 By Mr. McGough:

Q. You were up to the point where you said you heard a certain expression, is that right? A. Yes.

Q. What did you see or hear from that point on, please. Tell us what happened. A. Well, as I threw the bag—I threw the bag and the fellow bent over and raised the bag, leaped in the car and made his getaway.

Mr. Solovei: I object on the same

ground and I move to strike the answer out.

The Court: Same ruling.

Mr. Solovei: Exception.

By Mr. McGough:

Q. Now, please, did you have a look at that man's face? A. I could not distinguish it.

Q. Did you see if any persons were in the car? A. Could not distinguish it. 392

Q. Can you tell us about how tall and what weight the man that picked the bag up was?

Mr. Solovei: I object on the ground the witness said he could not see.

The Court: Objection overruled.

Mr. Solovei: Exception.

A. Possibly five foot four, five foot five.

Mr. Solovei: I move to strike the answer out on the ground it is speculative and guessing. 393

By the Court:

Q. Are you giving us your best recollection, sir? A. Best recollection.

The Court: Objection overruled.

Mr. Solovei: Exception.

By Mr. McGough:

Q. About how heavy, if you know—your best

approximation? A. I should judge about medium weight.

Q. You say the car moved away? A. Yes.

Q. In what direction did you see the car go? A. Over Surf Avenue right as you would say going north over Surf Avenue.

Q. That would be across the trolley tracks? A. Across the tracks, yes.

Q. And down in the direction of Neptune Avenue? A. Towards that direction, right.

395 Q. Is that right? A. Over the tracks.

Q. Towards Coney Island Creek? A. Right.

Q. Now, while that was being done, the car going away, did you see Fox? A. On his back.

Q. What if anything did you see him doing? A. He blazed away with his gun.

Q. When you say he blazed away, what did you see him do? A. Fired the shots.

Q. How many shots, if you know? A. Approximately six.

Q. Did you go over to the patrolman? A. I did.

Q. Where was he at that time? A. On his back.

396 Q. Where? A. Near that fire hydrant and the exit to that store—the store is empty now—what you call it—the bank is owner of the stores there near the fire hydrant.

Q. Were you there when the police officers arrived? A. I was.

Q. Did they arrive on foot or by radio patrol? A. By radio car.

Q. Did you see what if anything they did to Fox? A. They raised him into the car, lifted him.

Q. What did you see them do then? A. Off to the hospital—they left the premises.

Q. They drove away, you mean? A. Drove away.

Q. Now, Mr. Dolinsky, did you see that car again some time after that particular occurrence? A. I did.

Q. How much later, please, and where did you see it? A. Possibly an hour later, or earlier than that. It was on Stillwell Avenue, about a block and a half or two blocks away from Surf 398 Avenue.

Q. Between what blocks? A. Is it Mermaid Street in back of Surf?

Q. Would you care to turn around and look at People's Exhibit 2; perhaps it might assist you. A. There was a shanty, an old wooden building where the car was in front of.

By the Court:

Q. Between Mermaid and Neptune? A. Somewheres about here (indicating).

399

The Court: Indicating about the center of the block between Mermaid and Neptune Avenue on Stillwell Avenue.

By Mr. McGough:

Q. Do you see a number 2824 on the survey? A. I think so.

Q. Was it about there? A. About there, I should judge, somewheres around there.

Q. While you are on your feet, please, and you have the pointer in your hand, can you

400 indicate on that survey, please, as to about where you were when the man came out of the car and brushed you one way and then fired the shots at the policeman. I suggest you take the bigger diagram. A. There is West 12th Street—here it is (indicating).

The Court: That is near the Bowery, isn't it?

401 By Mr. McGough:

Q. Where is Surf Avenue? A. This is Surf. This is the route we took, on Surf Avenue here, catercornered here, and this is where I saw the car parked, about here where I have got my pointer.

Q. Will you take this white crayon, please, and mark a rectangular box to indicate the car where you first saw it, where you say the door was open and the lights were out? A. The car was about—

Q. Make it heavy. A. All right, I will make it
402 heavy—about here (marking).

Q. Will you make that a full rectangle, make it a little heavier. That is the car? A. That is the car (marking).

Q. Will you indicate with an "X", please, on the sidewalk where you say someone pushed you and did something to Fox? A. I will say about here (indicating).

By the Court:

Q. Were you in the gutter or on the sidewalk? A. On the sidewalk.

The Court: Mark it on the sidewalk.

A. On the sidewalk, I was about here where I make an "X" (marking). The officer was on this side, towards the curb. That is the officer, and that is me; the small "X", that is myself—the officer was on the inside.

By Mr. McGough:

Q. Will you make a big "X" and put "L.F." by it, indicating where the policeman was? A. Yes (marks). 404

The Court: Make a big "X".

A. (Continued) Puts "L.F.", and the small one for myself.

Q. Will you take a crayon, please, and with a sweep of your hand mark a real white line right from the bank from the north side of Surf Avenue, showing how you crossed over?

By the Court: 405

Q. Is this the theater (indicating)? A. Yes.

The Court: Suppose we mark it "T".

A. Mark it "T".

Q. With a circle around it? A. Yes.

Q. That is on the corner? A. Corner of Surf and Stillwell.

Q. How did you go from the theater along Surf Avenue? A. Right; and catercornered, this way.

Q. Then down the street.

406 *Herman M. Dolinsky—For People—Direct*

Mr. McGough: May I suggest it be made a little heavier, please?

(The Court marks out with red crayon, at the direction of the witness, the route which the witness says he took).

By Mr. McGough:

Q. Will you describe that car, please? What color? What it looked like if you know? A. The car was of a bluish color, with a cloth top.

407 Q. I show you this photograph, Mr. Dolinsky, and ask you if that correctly represents how you saw the car when you saw it again that night on Stillwell Avenue between Neptune and Mermaid? A. That is the car.

Q. Is that just the way it was at the curb when you first saw it? A. It was.

Mr. McGough: I offer that in evidence.

By the Court:

408 Q. You mean that is the car in the left foreground? A. Yes.

Q. There is a police car there, too. That is not the car you have reference to? A. No; I refer to this car (indicating).

Q. There is a car here with a license plate No. 6—Q—5923. Is that the car you have in mind? A. This is the car I have in mind.

The Court: Show it to counsel.

Mr. Geoghan: I have no objection to the admission of that picture in evidence, except that it be received simply as a

picture of a car found at the spot where it was found; but not that it is the car that was used in this particular holdup.

The Court: The witness says it is.

Mr. Geoghan: That is subject to cross-examination. I have already made that objection.

The Court: Want to cross-examine him on the voir dire?

Mr. Geoghan: When he is finished— 410
no, no—when he is finished.

The Court: As to the admissibility of the picture?

Mr. Geoghan: Yes; I would.

The Court: If you wish, you have the opportunity—you have the right before I pass on its admissibility.

By Mr. Geoghan:

Q. Mr. Dolinsky, how far was this car from you when you first saw a man jump out of it near the Brooklyn Trust Company? A. How 411
far?

Q. Yes. A. The car where the man leapt?

Q. Yes. A. About three feet away.

Q. Three feet away from where you were? A. From where I stood, where I walked; yes.

Q. Were you in the street or on the sidewalk? A. I was on the curb side of the sidewalk.

Q. Right at the curb or between the curb and the wall—that is, the building? A. No; towards the curb.

Q. Right at the curb? A. Closer to the curb, yes.

412 *Herman M. Dolinsky—For People—Cross (Voir Dire)*

Q. It was at that moment you saw a man jump out of a car? A. Yes.

Q. You saw him jump out? A. He leaped. He brushed me so I almost fell over on my face.

Q. You were watching him, weren't you? A. Watching him?

Q. You were looking at him, weren't you? A. When he leaped, I more than looked; I almost fell over on my face.

413 Q. Exactly; so you had your eyes on him, didn't you? A. I did not know what hit me.

Q. I say, did you have your eyes on him at the moment when you saw him leap from the car? Yes or no. A. No.

Q. Where were your eyes? A. I almost fell over.

Q. You mean you did not see anything? A. I did. I saw the man leap.

Q. When you say you almost fell over, what do you indicate by that? A. He jumped hit me and leaped at the cop.

414 Q. That happened very quickly? A. As quick as a flash.

Q. Maybe a second or so? A. Maybe a second or two seconds.

Q. At that moment was it that he fired the shots? A. At the cop.

Q. Yes; just as soon as he pushed you aside; is that right? A. Yes.

Q. Is that right? A. He jumped at the cop, let him have it.

Q. That is right after he almost pushed you over? A. Right after he almost pushed me over, right.

Herman M. Dolinsky—For People—Cross (Voir Dire)

Q. Then you heard these three shots; is that right? A. Yes.

Q. Did you look in the direction where he fired the shots? A. In running, I looked over my shoulder and I seen him fire the shots.

Q. Who were you watching—Fox—that is, the police officer? A. In looking back I saw the two.

Q. Both of them? A. Both of them; right.

Q. You were a little frightened at that time, of course—scared? A. I was not little.

Q. You were scared, weren't you? A. Naturally.

Q. That is quite all right. Then the man that you say fired these shots jumped back in the car? A. No; he commanded me to drop the bag.

Q. You dropped the bag first? A. Threw it at him; yes.

Q. How far away from him were you when you threw the bag? A. Possibly thirty or forty feet.

Q. He grabbed the bag and jumped in the car? A. He grabbed the bag and jumped in the car.

Q. How long did all this take from the time he got out of that car until he leaped back into it with your bag? A. Seconds.

Q. Just seconds? Then they were off? A. Like a flash.

Q. That was eleven o'clock at night? A. Eleven o'clock at night.

Q. Before or after eleven o'clock? A. I say eleven. I could not be sure.

Q. Did not notice the license plates on the car? A. Too dark.

Q. How long after that was it that you saw the automobile represented in this picture now offered in evidence? A. Possibly within an hour.

418 *Herman M. Dolinsky—For People—Cross*
(Voir Dire)

Q. You picked that out as the same automobile that you saw in the few seconds that had elapsed? A. Yes.

Mr. Geoghan: I object to it.
The Court: Objection overruled.
Mr. Geoghan: Exception.
Mr. Meadow: I make the same objection.
419 The Court: Overruled.
Mr. Meadow: Exception.
Mr. Solovei: May I just ask one question before your Honor will permit this picture in evidence—in behalf of the defendant Malinski?
The Court: Certainly.

By Mr. Solovei:

Q. While you were walking with Fox on the sidewalk on Surf Avenue after you left the theater, you paid no attention to any cars parked
420 on the street at all, did you, Mr. Dolinsky? A. I kept walking towards the bank.

Q. Nothing unusual for you to see parked cars on Surf Avenue, was it? A. Practically nothing unusual.

Q. The cars that you saw in a double row, that was nothing unusual, was it? A. Not in double row. I said, "second parking". There was no car around there but this car—second parking, what we call—in the middle of the gutter.

Q. When you walked along the avenue with Detective Fox, you paid no attention to cars on Surf Avenue, did you? A. On Surf Avenue?

Q. Yes. A. There were no cars on Surf Avenue—that particular night I mean there were no cars on Surf Avenue.

Q. No cars at all? A. Not as far as I can recall, no cars on Surf Avenue.

Q. You mean not a car parked on Surf Avenue —avenue— A. I seen no cars parked on Surf Avenue.

By the Court: 422

Q. This was in February? A. Yes; bitter, cold night.

By Mr. Solovei:

Q. This Loew's Theater is on what street? A. Surf Avenue and 14th Street.

Q. You were walking on Surf Avenue, from Loew's Theater to the bank, is that correct? A. Correct.

Q. You were walking towards 15th Street? A. Towards 12th Street. 423

Q. That is the Brooklyn Trust Company? A. Correct.

Q. And while you were walking along Surf Avenue you were in conversation with the officer Fox, is that correct? A. I was, yes.

Q. You had no reason to look for any car on Surf Avenue or anywhere else, is that right? A. The only thing I observed was that car in the middle of the gutter with a door open, facing Surf Avenue; that is the only thing caught my eye; but I saw nobody.

Q. You were observing the car on Surf Avenue

424 *Herman M. Dolinsky—For People—Cross (Voir Dire)*

with the door open, is that correct? A. On 12th Street, facing Surf Avenue.

Q. And you just took a fleeting glance at the car and kept on walking? A. Call it fleeting, yes; but I observed it.

Q. That glance was just for about a second, is that what you say? A. Plenty—a second—I could see a whole lot in a second.

Q. Did you notice what make the car was at
425 that time? A. As far as I recall a Ford; I cannot exactly say.

Q. You are not sure just what make it was? A. No.

Q. Could have been a Chevrolet and it could have been a Pontiac, it could have been a Ford, is that correct? A. Most likely a Ford.

Q. But it could have been a Chevrolet, too, couldn't it? A. Could have, yes.

Q. In other words, what you saw on Stillwell Avenue about an hour after this alleged crime was committed, or Fox was shot, was you saw a
426 car on Stillwell Avenue which was parked with the lights out, that looked very much like the car that you saw on 12th Street with the door open; is that correct? A. The car that I saw was the car that I saw on 12th Street.

Q. There was no particular identifying marks on this car that you saw on 12th Street, were there? A. There was—what you call it—a cloth top, a bluish color.

Q. You have seen a great many cars like it, haven't you? A. In my life, I did; yes.

Q. This car that you saw on 12th Street, with the door open, there was nothing unusual about this car that you have seen time and time again

in the city streets of the City of New York, is that correct? A. In one hour I can remember the same car.

Q. But I say, you have seen a great many cars actually like this in the city streets, in the City of New York? A. There are plenty of them in the streets, yes.

Q. And the reason why your identification is re-enforced, that you believe you saw this car, is because of the fact you found an abandoned car an hour after the alleged commission of this 428
crime, isn't that so? A. No; that was the car.

The Court: All right, mark it in evidence.

Mr. Solovei: I object to it.

The Court: Objection overruled; exception to the defendants. Of course, its weight and credibility are for the jury.

(Received in evidence and marked People's Exhibit No. 3.)

By Mr. McGough: 429

Q. I show you this photograph and ask you if it correctly represents the corner that you speak of here, West 12th Street and Surf Avenue, looking in a southerly direction, towards the water, as it was on the 15th of February, 1941 (showing). A. That is right.

Mr. McGough: I offer that photograph in evidence.

Mr. Geoghan: When were they taken?

Mr. McGough: They were taken the day after.

The Court: Show it to counsel, please.

(Picture shown to counsel.)

Mr. Geoghan: With respect to this, if the District Attorney will concede that it is not offered for the purpose of showing the condition of the streets, shown in this photograph, at or about 11 o'clock on February 15th, 1941, but that it is simply a
431 picture of those streets; I have no objection.

Mr. McGough: I will concede that it was taken the next day, your Honor.

The Court: In other words, there are some automobiles shown on that photograph.

Mr. Geoghan: That is the reason I make the point.

The Court: These automobiles on the photograph have nothing to do with the case. It is merely to give the jury an idea of what the streets look like?

432 Mr. McGough: Yes.

Mr. Geoghan: That is all I wanted.

The Court: That is clear.

(Photograph received in evidence and marked People's Exhibit No. 4.)

Q. I will now show you this photograph and ask you if that is a correct representation of 12th Street, looking north, as it was on the 15th or 16th of February, 1941, and does it show the

avenue that you testified about? A. That is correct.

Mr. McGough: I offer that photograph in evidence.

Mr. Geoghan: With the same concession by the District Attorney, no objection.

Mr. McGough: That is understood.

The Court: Mark it.

434

(Received in evidence and marked People's Exhibit No. 5.)

Q. Was it up that particular block that you say you saw this car go? A. Yes.

Q. I have one further question. Will you turn around, please, and indicate with your finger where the night depository would be on that survey? A. (Pointing).

Q. Right where you are indicating now? A. Yes.

Q. That is where you would deposit any sums you wanted to? A. Correct. 435

Mr. Geoghan: No questions on the part of Indovino.

By Mr. Solovei:

Q. Were you wearing your glasses on the night of February 15th? A. Yes.

Q. You have bad eyes? A. I would not call them bad.

Q. I just noticed you removed the glasses when you looked at the map. Can you see better

436 *Herman M. Dolinsky—For People—Cross*

without them? A. I did not remove them. I may have pushed them, because they slip. I did not remove them.

The Court: What is the purpose of the cross-examination?

Mr. Solovei: I don't know, if your Honor insists upon our making an explanation of the purposes of cross-examination.

437 The Court: I just want to be clear. I am not going to limit you at all, Mr. Solovei; but this man has not identified anybody. What is the purpose of the cross-examination?

Mr. Solovei: I did not ask about any identification.

The Court: All right; proceed.

By Mr. Solovei:

Q. Did you have your glasses on when you walked down Surf Avenue? A. I did.

438 Q. With Officer Fox? A. Correct.

Q. Could you see better with your glasses or without your glasses? A. Better with my glasses.

Q. Far sighted or near sighted, do you know? A. Far sighted.

Q. When this man that you talk about leaped out of the car and you were stunned—is that correct? A. Pushed.

Q. Fell. A. Almost fell,—gave me—I could run.

Q. The entire thing, as you said in answer to Mr. Geoghan's questions, took about a second,

the jumping out of the car, the shooting of the police officer, and the returning back to the car; is that correct? A. I did not say a second.

Q. You said about a second or two? A. A couple of seconds; yes.

Q. Immediately when you turned around you saw that the Officer Fox was shot? A. I did not turn around; I looked over my shoulder.

Q. You walked towards where he was, didn't you? A. After they were gone?

Q. Did you walk where Fox was after you 440
heard the shots? A. Oh, no; when they drove away I first made for the officer.

Q. The man jumped back in the car; is that correct? A. After lifting the bag.

Q. Jumped back in the car? A. Correct.

Q. And drove away? A. And drove away.

Q. They drove in some opposite direction, didn't they? Away from the boardwalk.

Q. Away from where you were? A. Correct.

Q. And you were then trying to help Fox? A. I ran to Fox immediately; right.

Q. Prior to these men jumping out of the 441
car— A. I said "the man" not "the men".

Q. A man? A. Yes.

Q. That man you never saw again? A. (No answer.)

Q. I say, you never saw that man in your life again, did you? A. I did not; no.

Mr. Geoghan: No questions.

Mr. Carabba: No questions.

By Mr. Solovei:

Q. You cannot tell who he is? A. I cannot.

442 *Max Kallman—For People—Direct*

MAX KALLMAN, residing at 1565 East 18th Street, Brooklyn, N. Y., called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. By whom are you employed? A. By the Colgate-Palmolive-Peet Company.

Q. How long have you been employed by that company? A. Nine years.

443

Q. In what capacity? A. Salesman.

Q. Do you recall where you were at about the hour of 11 p. m. on Saturday, the 15th of February, 1941? A. I do.

Q. Where, please? A. I was parked for a red light on the corner of Surf Avenue and West 12th Street, Coney Island.

Q. Were you driving your car? A. Yes.

Q. Did you have anybody with you? A. Yes, sir.

Q. Who? A. My wife.

Q. Where were you proceeding at the time you

444

stopped for the red light at that intersection? A. We were going over to Nathan's for a hot dog and some beer.

Q. Going towards Sea Gate? A. Yes.

Q. Where were you coming from? A. I was coming from the Nostrand Theater, Kings Highway and Nostrand Avenue. That is a moving picture theater.

Q. When you stopped for the red light on Surf Avenue and West 12th Street, did anything attract your attention? A. Yes.

Q. Tell us, please, what you saw what you

heard? A. I heard two shots—got out of my car—stepped into the gutter, heard some more shooting, and then saw a car fly across the avenue in the direction Neptune Avenue.

Q. What, if anything, did you do? A. I immediately got into my car, knowing that there would—

Mr. Geoghan: I object.

Q. Just tell us what you did? A. I got into my car and looked for an officer. 446

Q. Did you find one? A. Yes, sir.

Q. Where? A. On Surf Avenue right near the theater.

Q. Which theater was that? A. That is the Loew Theater.

Q. That was how far from West 12th Street? A. That is just one block away.

Q. Without telling us what was said, did you say anything to that officer or officers? A. Yes.

Q. Was he on foot or in a patrol car? A. It was a radio car.

Q. How many officers were there? A. Two. 447

Q. See them here in court today? A. I saw them in court yesterday.

Q. After you had a talk with them, did you see them do anything? A. Yes.

Q. What, please? A. They turned around immediately and proceeded where I heard the shooting.

Q. That was at West 12th and Surf? A. Yes.

Q. What did you do? A. I followed right in back of them in my car.

Q. Did you stop at West 12th and Surf? A. Yes.

448 *Max Kallman—For People—Direct*

Q. Did you see anything there at all? A. Yes, sir.

Q. Tell us, please, what you saw? A. I saw them picking the officer up and putting him into the radio car.

Q. When you say an officer, you mean a patrolman in uniform? A. Yes, sir.

(At this time two policemen were brought into the room.)

449

Q. Is this the patrolman, and is this the Sergeant, please, that you saw? A. Yes.

Mr. McGough: Identify yourselves for the record.

The Patrolman: Patrolman James P. Rabbitt, shield No. 12554, 60th Precinct.

The Lieutenant: Acting Lieutenant George A. Bremeier, shield No. 955 Air Warden Service.

(The two officers thereupon left the room.)

450

Q. They are the two officers that you first saw and spoke to after you heard the shots at West 12th and Surf Avenue on that night? A. Yes, sir.

Q. Did you see any fire or any flashes while you were out of your car on the pavement? A. Yes, sir.

Q. How many flashes did you see? A. At least two.

Q. Can you tell us, please, in what direction you saw these flashes? Where did they come

from? A. They were coming from the bank side of West 12th Street.

Q. Were you able to see any persons or figures at that particular point? A. No, sir.

Q. When that car passed by were you able to see how many persons were in the car? A. No, sir.

Q. Did you see that car again after it drove off, as you testified? A. Yes, sir.

Q. When and where did you see it? A. On Stillwell Avenue between Mermaid and Neptune. 452

Q. Did anybody bring you there to have you look at the car? A. Yes, sir.

Q. Who? A. The police officer.

Q. When you went back first to West 12th Street and Surf Avenue, did some one obtain your name and address? A. Yes, sir.

Q. Do you know who that somebody was? A. It was some officer who told me to wait.

Q. What color car was it, please? Can you describe it for me? A. Yes, sir. It was a blue car with a cloth top.

Q. Can you tell us whether the lights were on the car or whether they were turned off? A. 453 Off.

Q. I show you People's Exhibit marked 3 in evidence, and ask you, please, if that is the car that you say you saw that night? A. Yes, sir; that is the car.

Q. When did you first see that car again, please? A. Going across the avenue.

Q. At what avenue? A. Surf Avenue.

Q. What street? A. West 12th Street.

Q. When again, did you see the car for the second time that night? A. Parked on Stillwell Avenue.

454 *James P. Rabbitt—For People—Direct*

Q. Do you have any family? A. Yes, sir; little girl.

Q. How old? A. She is sixteen months old.

Q. Where is your wife? A. My wife is ill, and she has been occupied taking care of this baby, who has been under medical attention.

Mr. Geoghan: No questions on the part of Indovino.

Mr. Carabba: No questions on the part
455 of Rudish.

Mr. Solovei: No questions.

Mr. Morritt: No questions.

JAMES P. RABBITT, shield No. 12554, 60th Precinct, called as a witness in behalf of the People, being first duly sworn, by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

456 Q. How long have you been a member of the Police Department, Officer? A. Over eighteen years.

Q. Do you recall how you were working on the night of Saturday, February 15th, 1941? A. I do.

Q. What tour did you have? A. I was working four to twelve tour, operating a radio motor patrol, driving Sergeant Bremeier.

Q. Did you at or about the hour of 11 o'clock that night, see Mr. Max Kallman, the witness who was just on the stand? A. I did.

Q. Where did you see him for the first time?

A. He pulled up alongside of me on Surf Avenue in front of the Cosmos Restaurant.

Q. With reference to the Coney Island Theater, where was the Cosmos Restaurant? A. It was really between the Cosmos Restaurant and the Coney Island Theater.

Q. Right adjacent? Right? A. Yes.

Q. Were you in a radio patrol car? A. Yes.

Q. In which direction were you facing? A. Facing west on Surf Avenue.

Q. Would that be towards Sea Gate? A. Towards Sea Gate. 458

Q. Without telling us the conversation had, did Kallman say something to you and Bremeier? A. He did.

Q. As a result of that talk, did you do something? A. I did.

Q. Tell us what you did? A. I made a U turn and proceeded east on Surf Avenue to West 12th Street and Surf Avenue.

Q. Did you stop your car there? A. I stopped the car and observed Patrolman Fox lying on the sidewalk.

Q. You knew Fox before that night, of course? 459
A. I did.

Q. You worked in the same precinct with him, did you? A. Yes.

Q. Now, please, can you describe how Fox was lying when you first observed him? A. He was lying with his head towards the bank wall, right outside Dr. Bluestone's entrance to Dr. Bluestone's office.

Q. Did you do anything for Fox? A. We picked Fox up, Lieutenant Bremeier and myself, and placed him in my auto, the Department auto, and drove him to the hospital.

460 *James P. Rabbitt—For People—Direct*

Q. Which hospital? A. The Coney Island Hospital.

Q. I show you this photograph, Officer Rabbitt, and ask you does that correctly represent the spot where you say Officer Fox was lying on the pavement near Dr. Bluestone's entrance? A. That is right; that is the location.

Mr. McGough: May I offer that photograph in evidence?

Mr. Geoghan: No objection.

461 Mr. Solovei: No objection.

(Received in evidence and marked People's Exhibit No. 6.)

Q. Will you take this exhibit marked 6 in evidence, please, and indicate with an "X" on the face on the photograph where the body of Patrolman Fox was when you first observed it? A. (Witness marks).

Q. May I also ask you to mark "L.F.", so we will know what that is. A. (Witness marks).

462 Q. Was Fox conscious at the time you first arrived there? A. He was not.

Q. Were you able to talk to him? A. No; he was not able to talk. He was gurgling blood. We had no conversation; he was gurgling blood.

Q. So far as you know were you the first peace officer on the scene? A. I was.

Mr. Geoghan: No questions on behalf of Indovino.

Mr. Solovei: No questions.

Mr. Meadow: No questions.

LIEUTENANT GEORGE A. BREMEIER, Acting Lieutenant, shield No. 955, assigned to the Air Warden Service of the Police Department, called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Lieutenant, do you recall Saturday night, February 15, 1941, when Patrolman Leon Fox was shot? A. I do. 464

Q. Did you see the witness Max Kallman, who was here, at any time that night? A. Max Kallman?

Q. Kallman. A. Yes.

Q. Where did you first see him, please? A. I saw him outside of Loew's Theater Building; that is Surf and Stillwell Avenues.

Q. Where you on radio motor patrol then? A. I was.

Q. Were you with your brother officer Rabbitt? A. I was.

Q. Did you talk to Kallman? A. Yes. 465

Q. After the talk with Kallman did you do anything? A. I did.

Q. Tell us what you did and what you observed when you got there? A. I was about three steps away from the radio car, and Patrolman Rabbitt called me back and informed me that Mr. Kallman had informed him that he heard some shots.

Mr. Geoghan: I object to that.

Q. Don't give us any hearsay, Lieutenant.

466 After Kallman spoke to you did you do something? A. Yes.

Q. Tell us. A. We immediately proceeded in the radio car to make a radio turn, proceeded towards 12th Street and Surf Avenue.

Q. Did you see Patrolman Fox at that spot? A. I did. He was on 12th Street.

Q. Describe the position he was in at that time? A. He was lying on the ground on his back, and the gun was alongside of him, his re-
467 volver, we immediately proceeded—I then asked Patrolman Fox what had happened—he was unable to talk at the time. So I the informed Patrolman Rabbitt that we both—

Mr. Geoghan: I object to what he informed.

The Court: What difference does it make?

Mr. Geoghan: I know it does not make any difference but it is part of the record.

The Court: If you have a serious objection, I will sustain it.

468

A. We lifted Patrolman Fox into the radio car and I directed Patrolman Rabbitt that he should take him down to the Coney Island Hospital.

Q. When you saw him was he lying in the gutter or on the sidewalk? A. He was lying on the sidewalk.

Q. Did you see any detectives there shortly thereafter? A. I did.

Q. Did you see Detective Edward Basch? A. Yes.

Q. Did you see other police officers and detectives? A. I did.

Q. Did you remain there for a while after Patrolman Rabbitt took Fox away? A. I did.

Mr. Geoghan: No questions on behalf of Indovino.

Mr. Meadow: No questions in behalf of Rudish.

Mr. Solovei: I have no questions.

Mr. McGough: Would your Honor like to entertain a motion to adjourn for lunch?

The Court: Very well. We will take a 470
recess for luncheon at this time. Gentlemen of the jury, please don't discuss this case among yourselves or with any other persons, or permit anyone to speak to you about this case or discuss it in your presence. You must keep your minds open. Do not form or expres any opinion or conclusion as to the guilt or innocence of the defendants on trial or either of them, or any of them, until the case is finally submitted to you for your consideration after a charge on the law. You may retire and return at 2:15. 471

472 *George L. Corboy—For People—Direct*

AFTER RECESS, TRIAL RESUMED.

GEORGE L. CORBOY, Police Officer, Shield No. 10543, attached to the 60th Precinct, called as a witness in behalf of the People, being first duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

473 Q. You are a member of the Police Department, Officer? A. I am.

Q. For how long a period of time? A. 21 years.

Q. In the month of February, 1941, what Precinct were you assigned to? A. The 60th Precinct.

Q. And do you recall how you were working on that particular day, Saturday, the 15th of February 1941? A. I was doing the 4 to 12 tour.

Q. That would be what is called the late tour of duty? A. The late tour is from midnight to eight in the morning.

474 Q. Were you on foot patrol or in a radio car, or what? A. Radio patrol.

Q. Now what time did you leave the police station after your late tour that night? A. At about 25 after 12.

Q. At the time you left the police station, had you heard whether or not anything happened to Patrolman Leon Fox? A. I had heard that he had died.

Q. When you left the 60th Precinct on that night, where did you go to, Corboy? A. I went to 36th Street—no, to 2823 West 32nd Street, some friends of mine.

475

Q. Where is that, in Coney Island? A. In Coney Island, between Neptune Avenue and Mermaid Avenue.

Q. How long did you stay at that particular address? A. Oh, about five minutes.

Q. And will you tell us, please, what, if anything, you did after leaving that particular address? A. I went up 32nd Street to Mermaid Avenue, turned left and went down Mermaid Avenue to Stillwell, turned Stillwell left, going in the direction of Neptune Avenue, and was on my way home, and as I got opposite 2844, on the left side of the street, I observed an automobile, a dark blue Ford convertible sedan. The reason I observed that is because—

476

Mr. Solovei: I object to any reason, your Honor.

Q. You say you were on your way home at about that hour of the night? A. Yes, sir.

Q. And you told us that you went down Mermaid Avenue and you turned left into Stillwell? A. That is right.

477

Q. And you say as you were opposite 2844, you saw a car, is that right? A. Yes.

Q. Now at that particular time, had you any information with respect to what happened to Leon Fox, your brother officer? A. I did.

Q. I think you said a moment ago you had heard that Fox was already by that time dead? A. Yes, sir.

Q. When you saw this car that you just mentioned, did you do anything with respect to it? A. I did. I turned my car about and pulled up

right in back of this Ford and I got out of the car. I noticed that the rear license plate of the Ford was bent backward so it would be hard to read the license number of the plate. I went to the front of the car and I noticed the front plate was bent forward in the same manner. I flashed my light inside the car to see if there was a key in the car and I noticed that the wires had been crossed and cut and jumped. I looked on the floor of the car and noticed some insulation and
479 tubing on the floor. Of course I figured then it was a stolen car and I called up on the telephone, the station house, and asked them to look up to see whether there was an alarm on the car, and also mentioned that I had brought in two men previous, and they gave me a description of the car similar to that that was used in the Fox case.

Mr. Solovei: I move to strike that out.

The Court: Strike it out. The jury is instructed to disregard that statement.

480 Q. You did tell us that you brought two men into the police station before you went off duty at midnight that night? A. That is right.

Q. Do you know the names of those two men? A. One was Glodowsky.

Q. Glodowsky? A. Yes, sir.

Q. What is his first name? A. I think it is Benjamin.

Q. Benjamin Glodowsky? A. Yes, sir.

Q. Do you know the other man's name? A. I am not sure about his name; see, I had that name in my book, in my memorandum book; I had the name there but I cannot place it.

Q. Would you know it if you heard it? A. Yes, sir.

Q. Would it be Lester Windheim? A. Yes, sir.

Q. Is Glodowsky here today in the building? A. I saw him today.

Q. Well, now, you say that after you saw the car with these things that you narrated, you went and telephoned to the Precinct? A. That is right.

Q. Is that right? A. Yes. 482

Q. And after you telephoned the Precinct, did you go back to the car? A. I did.

Q. How long did it take to 'phone the Precinct and return to the automobile? A. I guess about eight minutes; eight to ten minutes.

Q. And did you remain at the automobile until somebody else arrived? A. I did.

Q. And who arrived at a later time, please? A. There were a number of detectives, and one I know was Detective Basch.

Q. Is that the gentleman sitting at my table here? A. Yes, sir. 483

Q. Detective Edward Basch? A. Yes, sir.

Q. And will you describe the car, please, that you say you saw at premises 2844 Stillwell Avenue? A. It was a dark blue convertible sedan, a Ford V8, 1936; license plates—four doors; license plates 1941, 6Q5923 N. Y. It had a—will I tell you about what marks were on it? What I observed on the car?

Q. Yes, will you please tell us. A. On the front right mudguard there was a bullet hole, and on the right side of the hood there was another indentation, a sort of ricochet bullet hit

484 it and bounced off; and the plates, both plates were bent, and the wires had been cut and jumped.

By the Court:

Q. What do you mean by "jumped"? A. The two wires were cut and tied together so the motor could be started without the ignition keys being turned on to make that connection.

485 By Mr. McGough:

Q. Officer Corboy, will you look at People's Exhibit 3 in evidence, please, and tell me whether that is the location of the car and the car that you observed when you turned down Stillwell Avenue, between Neptune and Mermaid Avenue, that night? A. That is.

Q. I show you this picture and ask you if that correctly represents the adjacent property where this car that you testified to was located by you on that night? A. Right in front of the

486 bungalow.

Q. You mean the bungalow that is portrayed on that photograph? A. I do.

Q. That picture was taken in the daytime, is that right? A. Well, there were a lot of pictures taken that night; that is, that morning, from one o'clock until I guess half past two or three o'clock, but I don't know whether this picture was taken later on in the day.

Q. Is that a correct representation of that particular spot where the car was parked? A. I beg pardon?

Mr. McGough: Read the question to him.

(The question was repeated by the stenographer.)

The Witness: It is.

Mr. McGough: May I offer that picture in evidence at this time?

The Court: Show it to counsel.

Mr. Geoghan: I thought it was in evidence.

Mr. McGough: That is another one. 488

Mr. Geoghan: No objection, with the concession that I have this morning, that it is not supposed to represent the scene at the time that the car was found.

Mr. McGough: That is correct. I will concede it.

Mr. Geoghan: No objection.

The Court: Mark it.

(Photograph received and marked People's Exhibit 7.)

Q. Now, Officer Corboy, just so we will know 489 exactly where this car was on 2844; will you mark a "X" on this photograph marked People's Exhibit 7, please. A. (Witness marks exhibit with "X".)

Q. Now is there an elevated railroad running along Stillwell Avenue at that spot? A. There is.

Q. Does it run parallel to the street or does it swerve at a certain portion? A. It swerves at a certain portion.

Q. Now I show you this photograph and ask

490 *George L. Corboy—For People—Direct*

you if it is a correct representation of Stillwell Avenue looking south toward the ocean at about the spot where you say you saw this car? A. Yes, it is.

Mr. McGough: May I offer that photograph in evidence, please?

The Court: Show it to counsel.

Mr. Geoghan: With the same concession; no objection.

491 The Court: Mark it.

Mr. McGough: I concede that it is not on the particular morning that the car was found.

(The photograph was received and marked People's Exhibit 8.)

By Mr. McGough:

Q. Now, Officer Corboy, I show you this photograph and ask you if it is not a correct representation of the same street at the same spot
492 looking in the opposite direction northerly towards Coney Island Creek? A. It is.

Mr. McGough: May I offer that photograph in evidence?

Mr. Geoghan: Same concession; no objection.

Mr. McGough: All right.

The Court: Mark it.

(Photograph received and marked People's Exhibit 9.)

Q. Now, Officer Corboy, I show you this picture and ask you if it is not a correct representation of the rear of the car as it was exactly as you first saw it on that particular night on Stillwell Avenue? A. Yes, it is.

Mr. McGough: I offer that photograph in evidence.

The Court: Show it to counsel.

Mr. Geoghan: Of course we will exclude the writing on the back of the photograph. 494

Mr. Meadow: The writing on the back we will object to.

The Court: Yes, we will cover that.

Mr. McGough: Yes, I think it should be taken out. We will block it out, Judge.

Mr. Geoghan: No objection to the picture.

Mr. McGough: I think before these should be shown to the jury, we should paste some paper on the back.

The Court: Yes, when the jurors are looking at the photograph, please do not turn it over and read the writing on the other side. Mark it. 495

(Photograph received and marked People's Exhibit 10.)

Q. Now, Officer Corboy, you testified, did you not, that when you examined the automobile, with respect to the ignition, you say the wires were cut and they were fused together or jumped? Did you say that? A. That is right.

Q. Is this a correct reproduction of what you saw when you first looked into that automobile with respect to the ignition? A. I must say now I am a little in doubt about this connection here; the two ends hanging down. At the time I saw it of course there was no white paper across there, but from the way they were—the wires may have been moved a little bit in order to take this photo.

Q. Were you there when detectives from the photo gallery arrived at the scene? A. Yes, but I did not put my head into the car.

Q. Were you there when they arrived at the scene? A. Yes, I was.

Q. Did you see them taking certain photographs? A. Yes.

Q. Will you look at that picture, please, and tell us first whether or not that is a picture of the interior of that car? A. That is.

Q. Now will you tell me whether that is a correct representation of what you saw at some time that night with respect to that automobile? A. That is.

Mr. McGough: I offer that picture in evidence.

The Court: Of course there is a hand here with a piece of paper in it. You did not see that when you looked at the car?

The Witness: No.

Q. Did someone hold up a white page or pad or paper behind the wires while you were there? A. If they did, I did not see it. I was out on the sidewalk and I was not paying any attention.

By the Court:

Q. Were the wires in this condition when you saw it? A. That looks similar to it, and the only thing is that they are hanging more straight, and I did not see it with that paper on it, and I saw it cut and the insulation on the floor, and this looks like the connection up here, but about it hanging level like that, I don't know.

Q. With the exception of that hanging straight down, and with the exception of the paper in the 500
hand there, you say that is an exact picturization of what you observed when you first looked into the interior of the car? A. Yes.

The Court: Show it to counsel.

Mr. Geoghan: We have no objection.

Mr. Solovei: I would have to object to it. The Officer says it is not exactly the way he saw it. There are some other things there. I do not see any importance to the thing. I don't know what he has in mind. I object to it in view of the fact that 501
the Officer says there is some change of some kind.

Mr. McGough: If there is any objection, I will ask it be withdrawn and marked for identification.

The Court: Mark it for identification.

(Photograph received and marked People's Exhibit A for identification.)

By Mr. McGough:

Q. Officer Corboy, you told us in your testimony

that when you examined the car that night, you saw what was a bullet hole had ricocheted on the car, is that right? A. That is right.

Q. I show you this photograph and ask you is this a correct representation of how the car looked when you saw it at that particular time on Stillwell Avenue? A. It is.

Mr. McGough: I offer that photograph in evidence.

The Court: Show it to counsel.

Mr. Solovei: I object to it on behalf of the defendant Malinski and I also object to the writing on the back of it.

The Court: The objection as to the writing is sustained.

Mr. Solovei: I object to the photograph upon the ground that it is incompetent, irrelevant and immaterial, and there is no testimony here to show that this photograph was taken how long after the alleged commission of the crime.

The Court: Objection overruled.

Mr. Solovei: Exception.

The Court: Mark it.

(Photograph received and marked People's Exhibit 11.)

Mr. Solovei: Your Honor will order the back of it deleted?

The Court: I have done so.

Mr. McGough: I will see to it that everything on the back is covered up.

The Court: Proceed.

By Mr. McGough:

Q. Officer Corboy, I think the hole that you testified to is apparent, but will you mark a large circle about the point that you say was the ricochet?

The Court: Point it out.

The Witness: Right here (indicating).

The Court: The Court has drawn an arrow to the spot indicated by the Officer, who sits here beside me, and has printed the word "Ricochet" at the bottom of the arrow. 506

Mr. Solovei: I object to the question, if your Honor pleases, upon the ground that there is no testimony before this Court to show that this man is qualified to testify to any particular hole in the fender, or whether it is from a bullet or from some other blunt instrument, as to how some little hole came into the fender of this car.

The Court: You should have made your objection before now. It is a little untimely but nevertheless I will sustain the objection. 507

Mr. McGough: I will ask a few questions on that.

The Court: Proceed.

By Mr. McGough:

Q. You are a policeman how long, please? A. 21 years.

Q. And during that time you have always been

armed with your own service revolver, haven't you? A. I have.

Q. I take it that you have fired that revolver on numerous occasions? A. I have.

Q. Have you attended rifle practice at the Police Academy? A. Pistol practice, I have.

Q. Rifle practice on occasions? A. Not in the Police Academy.

Q. Any time during the summer period have you fired any other weapon besides your own
509 service revolver? A. Sometimes.

Q. Have you seen and handled .45 calibre guns? A. Yes, sir.

Q. .38 calibre revolvers? A. I did.

Q. Short and long? A. I did.

Q. What kind do you have yourself? A. A .38 long.

Q. Bring it out and show it to us. A. I also have a .32 Special.

Q. Hold it by the handle. A. Yes.

Q. What particular type of ammunition does that gun fire? A. That is a .38 Special.

Q. Have you seen the effects of what those
510 bullets have done on metal objects? A. I have.

Q. Are you competent here to tell us—Question withdrawn.

Mr. Geoghan: I object to the question. That calls for a conclusion.

The Court: There is no question. It has been withdrawn.

Q. Have you had occasion to fire your own revolver and other guns at metal objects? A. I have.

Q. And have you seen at any time whether or not those bullets have perforated those metal objects? A. I have.

Q. Now are you prepared to tell us whether or not, in your opinion, you can tell what caused this particular perforation on the automobile that you say you saw on Stillwell Avenue that particular night of February 15, 1941, Yes or No?

Mr. Solovei: I object to it. 512
The Court: Yes or No.

Q. Yes or No. A. Yes.

The Court: What is the basis of the objection?

Mr. Solovei: All right, a Yes or No answer is all right. I withdraw the objection.

The Court: He said he is competent. He has had experience. Do you object?

Mr. Solovei: I object to the form of the question, yes, and move to strike his 513 answer out.

The Court: Repeat the question, please.

(The question was repeated by the stenographer.)

The Court: Yes or No.

The Witness: Yes, is the answer.

Q. What caused that perforation, Officer?

Mr. Solovei: I object to it.

The Court: On what ground?

Mr. Solovei: Upon the ground that

there is no proper foundation laid in the first place, and in the second place, a perforation such as appears in this piece of tin, on this mudguard, may be made by a thousand and one objects.

The Court: Wait a moment, Mr. Solovei. That is a matter that goes to the weight and credibility of the testimony, but not as to its admissibility.

Mr. Solovei: I object to it upon the
515 further ground that this witness cannot testify as an expert or otherwise that this perforation was made by a discharged bullet.

The Court: Well, that is what you contend, but I am now confining myself to a determination of whether his testimony is admissible, whether it is competent; not as to its weight or credibility; that is for the jury. Have you anything to offer to the Court on that point? Keep in mind that I am not ruling on the credibility or the
516 weight of his testimony. I am merely ruling upon its admissibility. He has testified that he has fired on numerous occasions, including objects constructed of metal, and that he has had experience in determining what the effect of the impact of the bullet upon such objects is, and he says that he is competent to tell that.

Mr. Solovei: Your Honor, there is not a single child that does not know if you fire a revolver through a piece of tin—

The Court: That goes to the credibility

or the weight of the testimony, but not as to its admissibility.

Mr. Solovei: Will you just let me ask this witness one or two questions on that point?

The Court: Yes.

By Mr. Solovei:

Q. Officer, this perforation here in the mudguard, which appears on People's Exhibit 11, do you see it from there? A. Yes. 518

Q. There is a slight hole in the right mudguard, is that correct? A. That is right.

Q. Now you have seen, have you not, in your lifetime, numberless holes in mudguards, haven't you? A. Yes.

Q. And the same kind of a hole could be made by any kind of a blunt instrument, isn't that right, Officer? A. I have not seen any of those kind. I have seen holes caused by accidents, big holes, pushed through the mudguards.

Q. You have seen little holes caused by rust and little holes caused by hammering with a chisel? A. Yes. 519

Q. And you say that it is possible by discharging a revolver into a piece of tin metal, such as we have here on the mudguard, that you could make a similar hole as appears on this photograph, People's Exhibit 11, isn't that correct? A. Repeat that, please.

Mr. Solovei: Please repeat the question to the witness.

(The question was repeated by the stenographer.)

The Witness: Yes.

Q. And there are probably a hundred different ways of marking that hole, isn't that right, Officer? A. Not that kind of a hole. That hole was made by a bullet.

Q. You say that hole was made by a bullet? A. Yes.

Q. You cannot make it with a chisel and a hammer, can you? A. No, not like that.

Q. Not exactly like that? A. No.

Q. Do you mean that? A. I mean that.

Q. Have you ever seen holes in mudguards similar to the one that you have here on People's Exhibit 11? A. Only bullet holes.

Q. Only bullet holes? A. Yes.

Q. You have never seen other holes like this? A. Not similar to the one here, not a hole like that. I have seen holes that size but never similar to that.

Q. Could you, from looking at this hole, tell us how far a distance the revolver was discharged before it made this hole? A. From how far?

Q. What distance would you say it was? A. Well, I know—do you want—I know already from observing the scene where the shooting took place, about how far.

Q. You mean you know because of the fact that you know the distance in this particular case? A. I know the scene where it happened.

Q. Without knowing that, would you be able to tell? A. Well, I may not be able to tell.

Q. You do not profess to be an expert on firearms, do you? A. No, not an expert on firearms.

Q. You never testified in your life as an expert on firearms, did you? A. No.

Mr. Solovei: No further questions.

Mr. McGough: May we have it marked?

Mr. Solovei: I press my objection.

The Court: Does any other counsel desire to ask questions on the voir dire?

(No answer by any of counsel.)

The Court: Your objection is overruled. 524

Mr. Solovei: Exception.

Mr. Meadow: The defendant Rudish joins in the objection.

The Court: Objection overruled.

Mr. Meadow: Exception.

By Mr. McGough:

Q. Now, Officer Corboy, when you examined the car, did you look all around the car and under the car? A. I did.

525

Mr. Carabba: I object to that as leading. I think the Officer should be permitted to testify what he did.

The Court: Objection sustained.

Mr. McGough: If there is any objection, I will withdraw it.

The Court: Proceed.

Q. You told us you went to the car and saw certain things? A. Yes.

Q. Then I asked you about certain photo-

graphs and they have been marked in evidence? A. Yes, that is right.

Q. Will you continue, please, and tell this Court and jury what, if anything, you found when you went around investigating and examining the car, as I was discussing it with you.

Mr. Carabba: Of course that is leading again and repetitious.

The Court: Objection overruled.

Mr. Carabba: Exception.

The Witness: When I returned, after making the telephone call to the station house, I observed a brown fedora hat.

By Mr. McGough:

Q. Where was it? A. On the ground, in the street, under the motor of the car, between the two front wheels. I also observed the ricocheted indentation of the bullet hole.

Q. And did you pick the hat up? A. I did.

Mr. Morrit: May I object at this point to testimony about the hat?

The Court: Objection overruled.

Mr. Morrit: Exception.

Mr. Solovei: May I, on behalf of the defendant Malinski, object to it upon the ground that it is incompetent, immaterial and irrelevant, and that the testimony here clearly shows that there was a lapse of from eight to ten minutes between the time he left the automobile and telephoned, and returned, and therefore any-

thing that was found around the car or under the car or near the car is objectionable.

The Court: Objection overruled.

Mr. Solovei: Exception.

Mr. Geoghan: On behalf of the defendant Indovino, I object to it.

The Court: Objection overruled.

Mr. Geoghan: Exception.

By Mr. McGough: 530

Q. You did not say you were gone ten minutes? You said you were gone what, eight minutes? A. About eight minutes.

Q. And it might have been less? A. It might have been less or a little more.

Q. Anyway, you found the hat? A. Yes, sir.

Q. What did you do about the hat? A. I picked it up.

Q. After you picked it up, did you look at it? A. I did.

Q. What, if anything, did you do with it then? 531

Mr. Solovei: I object to it.

The Court: Objection overruled.

Mr. Solovei: Exception.

The Witness: I turned it over to Detective Basch.

By Mr. McGough:

Q. I show you this hat and ask you if this is the hat? A. That is the hat.

Mr. McGough: May I have that marked for identification, please?

532 *George L. Corboy—For People—Cross*

The Court: Yes, mark it.

(Hat received and marked People's Exhibit B for identification.)

By Mr. McGough:

Q. Were you present when Detective Basch did anything with respect to this hat? A. I was.

Q. And what was that, please? A. He marked his initials in it.

533 Q. What are his initials? A. E. B.

Mr. McGough: Your witness.

Cross-examination by Mr. Geoghan:

Q. What time was it on that morning or that evening of February 15th, or midnight of the 16th, that you first saw the car? A. What time?

Q. Yes. A. That was about one a. m. on the 16th.

Q. And you made a notation of that in your
534 book? A. I have it in my book.

Q. You have it? A. Yes, sir.

Q. Have you got it with you? A. No, I have not my book with me.

Mr. Geoghan: That is all.

Cross-examination by Mr. Carabba:

Q. Officer Corboy, Stillwell Avenue, between Mermaid and Neptune, is the street that you found the automobile on, is that correct? A. That is right.

Q. And one side of Stillwell Avenue is occupied by the elevated structure, is that correct? A. That is right.

Q. There are no houses on that side? A. That is right.

Q. Is that the side of the street you found the car on? A. No.

Q. You found it on the opposite side? A. Yes, sir.

Q. You were through with your tour of duty at what time? A. I was through at twelve but 536
by the time I changed my clothes and got out.

Q. Where did you 'phone from when you 'phoned to the station house? A. From Stillwell Avenue and Mermaid.

Q. Is that a police box on that corner? A. No.

Q. You did not use the police box? A. No.

Q. Where did you go? A. I ran up to Mermaid Avenue.

Q. What is that? A. I ran to Mermaid Avenue.

Q. Where on Mermaid Avenue did you 'phone from? A. At a bar and grill on the north—on the southwest corner of Mermaid and Stillwell. 537

Q. There is a police box, is there not, on the corner of Mermaid and Stillwell? A No, there is not.

Q Where is the nearest police box to where you found the car? A Neptune Avenue and Stillwell.

Q. Where? A. Neptune Avenue and Stillwell.

Q. Well, wasn't Neptune and Stillwell nearer to where you were to 'phone? A. I believe it was.

Q. And if you went to the police box, all you have to do was open the door and take the re-

538 *George L. Corboy—For People—Cross*

ceiver off, and you are connected right with the House? A. That is right.

Q. Wouldn't it take you more than ten minutes to go where you said you went on Mermaid Avenue to 'phone? You 'phoned in a regular coin box, didn't you? A. Yes.

Q. Wouldn't it take you more than ten minutes to go where you said you 'phoned and come back to the scene where you found the car? A. No. it would take me about one minute.

539 Q. Well, if you used the police box on the corner of Stillwell and Neptune, you would not have to use any coin at all? A. That is right. I did not think of that box at the time.

Q. But there is a box there?

The Court: What difference does that make? What is the point of the cross-examination?

Mr. Carabba: The period of time, your Honor, that elapsed from the time Officer Corboy first saw the car and when he reported it.

540 The Court: I see.

Mr. Carabba: And then when he returned, he found a hat.

The Court: All right.

Mr. Carabba: That is all.

Cross-examination by Mr. Solovei:

Q. This place on Stillwell Avenue where you saw this car is well inhabited? A. Well, quite.

Q. There are apartment houses there and there

are stores there, is that correct? A. Yes, there is some small stores.

Q. And the elevated structure and the elevators were running on that night? A. On the other side of the street.

Q. On the other side of the street? A. Yes, sir.

Q. The people were coming off the elevated and going up to the elevated? A. Not at that particular time I found the car.

Q. I mean not at that particular second, but between the hour of 11 and 1, in all probabilities, people did go up and down that elevated station? A. I don't know how it was there. 542

The Court: This was in February, wasn't it?

The Witness: Yes, sir.

Q. Stillwell Avenue is a busy spot at that time? A. Up around Surf Avenue, it is.

Q. And it was around one o'clock, in any event, that you picked this hat up, is that correct? A. That is right. 543

Mr. Solovei: I now renew my motion and object to any testimony with reference to the hat, upon the ground that it is too remote and highly improper.

The Court: Objection overruled. The motion is denied.

Mr. Solovei: I take an exception.

Mr. Morritt: On behalf of the defendant Rudisin, I move to strike it out.

The Court: Same ruling.

Mr. Morritt: Exception.

544 *George L. Corboy—For People—Redirect—Recross*

By Mr. McGough:

Q. Will you take this red pencil, please, and indicate with a box on the survey, People's Exhibit 2 in back of you, just where it was that you saw the car on Stillwell Avenue. Just look at the location plan at the left. You said it was between Neptune and Mermaid. A. Between Neptune and Mermaid; that is correct. Is this
545 the sidewalk here?

Q. That line indicates a sidewalk. Mark it with a box, Officer, so we can see it from the back here. A. (Witness marks plan with a box.)

Q. Now, Officer, from where that car was parked, how far a distance would you say it was to the BMT station at Coney Island? A. Oh, I would say about from 150 to 225 feet.

Q. Maybe a block, or more or less, is that right? A. About a block, because the station—there is two ways of getting into the station, and if you go in the Stillwell Avenue side, that
546 is only about, oh half a block from Mermaid Avenue to the station.

Q. It is rather close to the station, is that it? A. Yes, sir.

Mr. McGough: That is all.

By Mr. Carabba:

Q. It is a fact, that at that point, that is the terminal for the Sea Beach Line, is that correct? A. Yes.

Q. And the West End Line? A. Yes, sir.

Q. The Brighton Line? A. Yes, sir.

547

Q. And you have the Sea Gate Line trolley there? A. Yes.

Q. You have the West End Line trolley, is that correct? A. The West End Line; that is right, that runs along Stillwell Avenue.

Q. You have the railroad, the Sea Beach, the West End Railroad, I mean the subway of Sea Beach, the subway West End at that terminal end there, is that correct? A. That is right.

548

Mr. Carabba: That is all.

By Mr. McGough:

Q. And they all go to New York, is that right? A. Yes, all except the Railroad Avenue car; that goes to Sea Gate.

Mr. McGough: That is all.

By Mr. Carabba:

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Q. There is one more line, the Culver Line, is that right? A. Yes.

Mr. Carabba: That is all.

550 *Det. Edward Basch—For People—Direct*

DETECTIVE EDWARD BASCH, Detective-Police Officer, City of New York, Shield No. 1245, attached to the 66th Squad, called as a witness in behalf of the People, being first duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Now Detective Basch, in February of 1941, where were you assigned, please? A. The 60th
551 Squad Detectives.

Q. How long have you been a member of the Police Department? A. 16 years.

Q. And how long have you been a member of the Detective Bureau of that Department? A. At the Coney Island District?

Q. No, of the whole Detective Bureau? A. Seven years.

Q. Was this case assigned to you after it occurred on February 15, 1941? A. Yes, sir.

Q. Did you respond to the scene that night and take up the investigation the minute you were assigned to it? A. Yes, sir.
552

Q. I show you People's Exhibit B marked for identification, and ask you, please, if you have seen that before and when it was the first time you cast your eyes on it. A. Yes, sir. I saw it on February 16th at about 1:10 a. m. Patrolman Corboy delivered it to me.

Q. And without telling us what was said, did Corboy and you have a conversation with respect to that People's Exhibit B? A. Yes, sir.

Q. And after that, did you do certain things with respect to that hat? A. Yes, sir, I marked my initials in front of Patrolman Corboy, inside the sweatband of that hat.

Q. And your initials are what, sir? A. E. B.

Q. And E. B. was placed on the inside sweatband by you at that time? A. Yes, sir.

Q. Now subsequent to the 15th of February 1941, did you work on this case, Yes or No? A. Yes, sir.

Q. And was there a time later on when you left the 60th Squad? A. Yes, sir.

Q. And what Squad did you go to? A. To the 66th Squad.

Q. And do you recall the month of the year 554
that was? A. Around November, I think, of 1942.

Q. And do you know the name of the Officer or Detective that received the case when you left the 60th Squad? A. Yes, sir, Detective George Low.

Q. He is still on the case so far as you know? A. Yes, sir.

Mr. McGough: You may examine.

Mr. Geoghan: No questions.

Mr. Carabba: No questions.

555

Mr. Solovei: May I ask this Detective one question, if your Honor pleases?

The Court: Yes.

Cross-examination by Mr. Solovei:

Q. Did you look for any fingerprints on this hat? A. Yes, sir.

Q. Did you find any fingerprints on it? A. No, sir.

Q. No fingerprints at all? A. No, sir.

Mr. Solovei: That is all.

556 *Det. Edward Basch—For People—Redirect*

By Mr. McGough:

Q. In all your time in the Police Department did you ever see a fingerprint on any hat?

Mr. Solovei: I object to it.
Mr. Morritt: I object to it.
The Court: Objection overruled.
Mr. Solovei: Exception.

557 Q. Did you hear me?

Mr. Solovei: I object to it upon the ground that the question is highly improper, and whether he did see or did not see, I do not think he is a qualified expert to testify as to whether fingerprints can be on hats or coats.

The Court: Objection overruled.
Mr. Solovei: Exception.
Mr. Carabba: I make the same motion on behalf of the defendant Rudish.
The Court: Objection overruled.
558 Mr. Carabba: Exception.
Mr. Geoghan: The same objection on behalf of the defendant Indovino.
The Court: Objection overruled.
Mr. Geoghan: Exception.
The Witness: No, sir.

By the Court:

Q. You mean, a fingerprint on a felt hat? A. No, never saw a fingerprint.

Pvt. Benjamin Glodowsky—For People—Direct 559

By Mr. McGough:

Q. Can you get a fingerprint from any cloth, if you know? A. No—

Mr. Solovei: I object.

The Court: Objection sustained as to that.

PRIVATE BENJAMIN GLODOWSKY, re- 560
siding at 3066 Brighton 13th Street, Brooklyn, N. Y., called as a witness in behalf of the People, being first duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Your name is Benjamin Glodowsky? A. Yes, sir.

Q. You are a Private in the Armed Forces of the United States Army? A. Yes, sir.

Q. And at the present time, Glodowsky, where 561
are you stationed? A. Camp Hood, Texas.

Q. Camp Hood? A. Yes.

Q. Did you come from Camp Hood, Texas, to testify at this trial at my request? A. Yes, sir.

Q. How old are you, Private Glodowsky? A. 21.

Q. Now do you recall the 15th day of February, 1941? A. Yes, sir, I do.

Q. Do you recall where you were at about 11 o'clock on that particular night? A. Yes, sir.

Q. Where were you? A. I was just passing 12th Street going towards 11th Street on the north side of Surf Avenue.

562 *Pvt. Benjamin Glodowsky—For People—Direct*

Q. Were you going towards Sea Gate or were you going toward Ocean Parkway? A. I was going towards Ocean Parkway.

Q. Were you alone or were you in company of somebody else? A. No, sir, I was with a friend of mine.

Q. What is his name? A. Lester Windheim.

Q. Do you know where Lester Windheim is now? A. He is in the Navy. He is on the water somewhere.

563 Q. He is on the ocean? A. Yes.

Q. As you were passing West 12th Street and Surf Avenue, was there anything that attracted your attention? A. As I passed 12th Street and Surf Avenue?

Q. On your way to Ocean Parkway? A. No, sir.

Q. Did anything occur at about that time and that place? A. Yes, sir.

Q. Tell us about it. What did you see and what did you hear. A. As I was passing 12th Street and going towards 11th Street, on the north side of Surf Avenue, I heard a series of 564 two shots. We turned and started running towards the corner of 12th Street and crosed Surf Avenue.

Q. Toward what corner? A. Going to the corner of the bank.

Q. You mean the Brooklyn Trust Company? A. That is right, and after the first series of two shots, while we were running across the street, we heard another series of shots, about five or six, and as we got to the corner, we heard Mr. Dolinsky hollering for help.

Q. Who is Mr. Dolinsky? A. He is the manager of the Loew's Theater.

Q. You saw him there that night? A. Yes, sir.

Q. All right, continue. A. And we turned the corner and he was hollering for help, and he said a cop had been shot. As we looked down the street a few yards, we seen the cop laying on the sidewalk. We ran towards the Fascination Game and we called the police.

Q. Who called the police? A. I did.

Q. And the Fascination Game, where was that, 566
please? A. I think it is about half a block from 12th Street.

Q. On the same side? A. Yes, sir.

Q. You ran there to telephone? A. And called the police, and then we went back to the scene, and there was a car already there, a police car.

Q. I cannot hear you. A. There was already a police car at the scene, and while two policemen took us to 12th Street—to the 8th Street station where we later identified the car.

Q. Well, before you identified the car, had you seen an automobile at the corner of West 12th 567
Street and Surf Avenue? A. Yes, after the first series of two shots, we started running towards the corner of the bank, and a car shot out from the curb. It was very fast, and went down 12th Street towards Neptune Avenue.

Q. Were the lights of that car on or off? A. The lights were out in that car.

Q. Can you describe that car for us, please? A. Yes, sir; the car was a blue body with a cloth top.

Q. A small car or a large car? A. Well, it was a small car.

568 *Pvt. Benjamin Glodowsky—For People—Cross*

Q. Now after you telephoned the police, as you said, did you go back to West 12th Street and Surf Avenue? A. That is right.

Q. Did you see the policemen and the detectives there? A. Yes, sir.

Q. Were you able to see any persons in the car? A. No, sir, I did not.

Q. I hand you People's Exhibit 3 in evidence and ask you if this is a picture of the car that you saw that night? A. That was the car.

569 Q. Is that the car you say you saw dash across Surf Avenue going on West 12th Street? A. That is right.

Mr. McGough: Your witness.

Mr. Morritt: No questions.

Cross-examination by Mr. Geoghan:

Q. You say you saw the car when it was passing where you and your friend were walking

570 along? A. That is right.

Q. Was that before you heard the shots or after? A. Well, we heard a series of two shots and then we started across the street and running towards the corner of the bank, and we heard the other series of the shots, and the car pulled out from the curb.

Q. How long did you have it under observation? A. About a second or two.

Q. About one second or two? A. Yes, sir.

Q. And you describe that picture as the car that you saw for a second or two on that night? A. Yes, sir.

By Mr. McGough:

Q. But you saw that car for some length of time on Stillwell Avenue, is that what you said? A. Yes, sir.

Q. And you had occasion to look at that and you identified that as the same car? A. I identified that car that same night.

Q. How did you get from where you were that night to Stillwell Avenue? A. We were brought by two policemen in the car. 572

By Mr. Geoghan:

Q. How long was it after you saw the car for one or two seconds that you said, that you saw it again that night or that following morning? A. I think about two hours.

Q. About two hours after? A. Yes, sir.

Q. How far away from the place where you first saw the car was it when you saw the car two hours afterwards? A. You mean the first time I saw the car?

Q. No, the second time. A. How far away 573 from the car was I?

Q. You say you saw the car first for about one or two seconds as it passed you? A. That is right.

Q. And then two hours later you saw a car again? A. That is right.

Q. And the car that you saw two hours afterwards, of course you had plenty of opportunity of examining it, didn't you? A. Naturally.

Q. And you mean, this is a picture of the car

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that you saw two hours afterwards? A. That is right.

Mr. Geoghan: That is all.

By Mr. McGough:

Q. And is that the picture of the car that you saw dashing across West 12th Street? A. That is a picture of the car that I saw dashing across.

575 Q. Is that a picture of the car that you saw at the time you heard shots? A. Yes, sir.

Q. Please tell us about how far were you from this car at the time those shots were going on? A. As the car shot by me, I was about 20 yards from the car.

Mr. McGough: That is all.
Mr. Geoghan: No further questions.
Mr. Carabba: No questions.
Mr. Solovei: No questions.

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576 JULIUS GIMBEL, residing at 2358—84th Street, Brooklyn, N. Y., called as a witness in behalf of the People, being first duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Mr. Gimbel, by whom are you employed, please? A. By E. W. Bliss.

Q. E. W. Bliss & Company manufacture what? A. It is a war plant.

Q. A war plant? A. Yes, sir.

Q. And how long have you been employed there? A. Since November 6, 1941.

Q. Are you married or single? A. I am married.

Q. Have you ever been convicted of a crime? A. No.

Q. Do you recall Saturday night, the 15th of February, 1941? A. Yes, sir.

Q. Do you recall where you were at about the hour of 11 p. m.? A. Yes.

Q. Where were you, please? A. I was on Surf 578
Avenue and 12th Street.

Q. That is in the Borough of Brooklyn, County of Kings? A. Yes, sir, that is in Coney Island.

Q. Were you alone or were you in company of somebody else? A. I had two girl friends with me.

Q. You had two girl friends with you? A. Yes.

Q. And at that time were you single? A. Yes.

Q. Was Mrs. Gimbel one of the girls? A. Yes, sir.

579

Q. Now did something happen at that time and place that attracted your attention? A. Yes, as we were approaching the corner of 12th Street and Surf Avenue, I saw and heard shooting and gun flashes, and I put the girls down behind the car. I was on the curb.

Q. Tell us first, please, were you on Surf Avenue or were you on West 12th? A. I was on Surf Avenue, approaching 12th Street.

Q. Were you on the north side toward Neptune Avenue or were you on the south side

toward the boardwalk? A. I was on the north side.

Q. And were you walking towards Sea Gate or toward Ocean Parkway? A. Towards Ocean Parkway.

Q. Now you say you heard some gunfire? A. Yes, I heard gunfire and I saw quite a bit of flashes coming from 12th Street.

Q. From what particular corner? A. That is diagonally across the street from where I was at the time.

Q. Do you know what is located on that corner? A. Yes, there is a hotel of some sort; that is the corner that I was on.

Q. Where the flashes came from, do you know what is on that corner? A. Yes, there is a bank on the corner.

Q. All right, continue. A. I was on the curb and I heard, as I said, I heard the shooting and the gun-play, and I saw the flashes, and I put the girls down behind the car because I immediately realized that something unusual had taken place, and then, as I say, there was quite a bit of shooting.

Q. How many shots or flashes did you see or hear? A. I would say there were five or seven shots. The last two shots came kind of slow; that is, they were dragged out, and as I recall there was a slight pause for only about a second or so, and then I walked towards the corner, leaving the girls by the car, and as I approached the corner, there was a roar, and this car shot out from that street; from 12th Street.

Q. What kind of a car was it? A. It was a four-door sedan.

Q. A small car or a large one? A. No, it was a small car.

Q. How far were you from that car at the time that it shot past you? A. About your distance from me.

Q. Well, can you approximate? A. About 15 foot.

Q. How many men were in that automobile, Mister—

Mr. Morritt: I object, if the Court pleases. 584

The Court: If you know.

By Mr. McGough:

Q. How many men did you see in the automobile?

Mr. Morritt: I press my objection. There is no testimony that he saw anyone.

The Court: If he knows; if he saw any. First of all, let us know whether he saw anybody. 585

Mr. McGough: I will withdraw the question.

The Court: Proceed.

By Mr. McGough:

Q. You say you were about 15 foot from the car? A. Yes, sir.

Q. Did you see anybody in the car? A. Yes.

Q. Now, Mr. Gimbel, will you tell me how many men you saw in the car? A There were three men.

586 Q. And tell me, please, how you saw them? How were they placed and where were they seated. A. There were two men in the front, and one man in the back that was bent over.

Q. Can you describe the men in the front, please. A. No. They were two short men. Briefly—I only got a shot of the driver because it went past at such a terrific speed, kind of little full-faced.

Q. How about the man in back, Mr. Gimbel?
587 A. Well, he was a thin man and his head was bent over, kind of ducking, and his hair was slicked back.

Q. So that you were able to see his hair? A. Yes, I made out his hair.

Q. Did you see any hat on his head or in his hands? A. No.

Q. Would you say the man in the back was a thin man or a stout man? A. He was a thin man.

Q. Well, after that happened, Mr. Gimbel, what did you do? A. Well, they passed and I watched them going down 12th Street.

588 Q. Toward the creek? A. Passing under the elevated and heading down that way, and I told the girls to remain where they were and I walked across the street because I had heard a man hollering for help.

Q. Who was that, if you know? A. That was Mr. Dolinsky.

Q. That was the manager of the theater? A. Yes, sir.

Q. Yes? A. As I approached him, I asked him what was wrong.

Mr. Geoghan: I object to that.
The Court: Objection sustained.

By Mr. McGough:

Q. Don't tell us that. Did you have a talk with him? A. Yes.

Q. Did you see anybody in uniform on the sidewalk, or any place else? A. No, not where he was at that time.

Q. At any time, did you see a man in uniform? 590
A. Yes, sir.

Q. When was that? A. After I had spoken with the manager, and after he told me that a policeman had been shot.

Q. Don't tell us what he said. Did you see anybody that was on the sidewalk? A. Yes, sir.

Q. Who was that somebody? Was it a man in uniform or otherwise? A. It was a man in uniform.

Q. Can you tell us how far from where Dolinsky was on the corner that you saw the man in uniform? A. I met Dolinsky on the opposite corner. 591

Q. Would that be the corner of Childs Restaurant? A. Yes, sir.

Q. And did you cross over to the other side where you say Fox was? A. Yes, sir.

Q. Did you talk to Fox? Did you go up to him? A. Yes.

Q. At that time was he conscious or unconscious? A. He was conscious.

Q. Will you describe the position of the body, please? A. He was lying directly across the

592 doorway with his hat a couple of inches from his head.

The Court: Speak louder.

The Witness: He was lying across the doorway. His hat was a couple of inches from his head and the gun was a couple of inches from his right hand.

By Mr. McGough:

593 Q. Can you describe that gun? A. Yes, it was a nickel-plated gun.

Q. What kind of a handle? A. A pearl-handled revolver.

Q. How far was that from his right hand? A. Just a couple of inches.

Q. Was he able to talk to you, Yes or No? A. Yes.

Q. Was his winter overcoat on? A. Yes.

Q. Buttoned up to his collar? A. Yes, sir.

Q. Did you do anything with respect to his overcoat? A. Yes, I opened up his collar be-
594 cause he was choking and coughing some blood up—

Q. You say you saw blood? A. Yes.

Q. Coming from where? A. From his mouth, and I opened up his collar and I figured maybe that will relieve his breathing a little, and he asked me to—

Mr. Geoghan: No—

Mr. McGough: Never mind what he asked.

Mr. Geoghan: I object to this line of

595

testimony on the ground that it does not mean anything at all.

The Court: Objection sustained.

By Mr. McGough:

Q. Were you there, Mr. Gimbel, when the police officers arrived? A. Yes, sir.

Q. And did you give your name and address to somebody there at that time? A. Yes, I did.

Q. Was this policeman in uniform, did you say? A. Yes, sir.

596

Q. Sometime later that night, were you down on Stillwell Avenue? A. Yes, sir.

Q. Did somebody take you down there? A. Yes.

Q. Did you see an automobile? A. Yes.

Q. And did you identify that as the car you saw dash by with the three men in it? A. Yes.

Mr. Carabba: Of course that is leading.

Mr. McGough: That is preliminary.

The Court: Proceed.

597

By Mr. McGough:

Q. I show you People's Exhibit 3 and ask you if that is a picture of the car that you saw at that time? A. I got the side view of it.

Q. Is that the car? A. Yes.

Q. Now when you saw the car dash by West 12th Street under the Elevated, do you mean the elevated structure that is shown here in People's Exhibit 5 in evidence? A. Yes, sir.

Q. In other words, if you turn around, Mr. Gimbel, and look at People's Exhibit 2, the sur-

598 *Julius Gimbel—For People—Cross*

vey; stand up, please, where the red markings are; can you indicate where the elevated structure cuts across West 12th Street? Would that be about where the elevated structure would be? A. Yes, sir.

Q. So that a car going north toward Neptune Avenue and West 12th Street would have to go under those elevated tracks, is that right? A. Yes.

Q. And those are the tracks that you see here
599 in People's Exhibit 5? A. Yes, sir.

Mr. McGough: Your witness.

Cross-examination by Mr. Solovei:

Q. This was a closed four-door sedan, is that right? A. Yes, sir.

Q. About 11 o'clock at night? A. Yes.

Q. You saw a car dash by you while you were sitting in another car talking to your girl friends? A. No, I have not got a car.

Q. You did not have a car? A. No.
600 Q. You were on the sidewalk? A. Yes, sir.

Q. Talking to your two girl friends at the time? A. No, not at the time of the shooting.

Q. What? A. Not at the time the car flew past.

Q. Were you by yourself? A. No.

Q. Were you standing and talking to anybody? A. No.

Q. Where were you when this car passed you? A. I was standing directly on the corner with two girls at the car where I left them.

Q. You were standing and talking to two girls on the corner of Surf Avenue and what

street? A. No, sir, I was not talking. I was standing at the corner of 12th Street with the two girls at the car, when I left them, just as I saw the shooting.

Q. Now, Mr. Gimbel, I want to get this right. You were standing on the corner talking to the two girls? A. No, I think you have the story wrong.

Q. I want to get it right. I am asking you, will you tell me just where you were at the time the car passed you? A. The conversation 602
stopped when the shooting took place.

Q. Where were you standing when this car passed you? A. Right on the corner.

Q. The corner of where? A. The corner of 12th Street and Surf Avenue.

Q. Were you on the opposite side of the street where the shooting took place or on the same side of the street? A. I was diagonally across from the shooting on the opposite side of the street.

Q. And then this car passed you while you were standing on this corner? A. Yes.

603

Q. Is that right? A. Yes.

Q. It was a four-door closed sedan car? A. That is right.

Q. Is that right? A. Yes.

Q. And then you say you saw three people in the car? A. Yes.

Q. They were seated in the car? A. Yes, the three of them were seated.

Q. And you could tell from the position they were seated in whether they were short or tall men, is that right? A. The two men in front were short.

Q. You could tell from the position while seated in this sedan car whether they were short or tall? A. That is, you see, it is the man who was driving the car looked as though he was—that he could not reach the pedals—usually in a short man he uses a pillow, whereas this man looked as though there was no pillow behind him. He was bending over the wheel reaching—that is—that is the impression I got immediately.

605 Q. The impression you got of the men that were in the car was that two men in the front will be about 5 feet tall, is that it? A. They were shorter than I was.

Q. How tall are you? A. 5 foot 6.

Q. Would you say they were about 5 foot tall? A. They were in between 5 foot, 5 foot 3 and 5 foot 4.

Q. You can tell that from the way they were sitting in the car? A. Yes.

Q. In a closed car; in a sedan car? A. The windows were open, the front one, because he had his hands sticking out; his arm sticking out
606 at the time, his hands on the wheel.

Q. Can you tell us whether—did you look at their nails; could you see their nails on their hands? A. No, they were going too fast.

Q. What? A. They were going too fast.

Q. They were going too fast? A. Yes, sir.

Q. You could not tell us whether the nails were manicured or not? A. If they would have stopped at the time, I would have looked.

Q. How fast would you say they were going when they passed you? A. Well, they roared, and I have not seen a car roar out like that for

a long time. Maybe you would see it on the speedway.

Q. The car that passed you was going very fast, wasn't it? A. Yes, very fast.

Q. And you got a fleeting glance at the car and the persons in the car, isn't that correct? A. Yes.

Q. And the glance that you got was something that just took about a second and they passed you right by? A. The glance started as I heard the roar, and I followed it across the car-tracks, 605
and as it went past in front of me, and the glance continued as they continued on.

Q. The car was parked on the other side of the street diagonally across from where you were standing originally, isn't that so? A. The car—I don't know where it was parked. All I did say was I saw it roar out of the middle of the street.

Q. It did not make a turn, did it? A. Not at that speed.

Q. It just shot right by you where you were standing? A. That is right. I saw it come out 609
of the street headed right towards the middle and it seemed to pick up momentum on the car-tracks and head right past me.

Q. And from your observation, you could tell how the man's hair was combed, in the back of the car? A. I saw the man's head distinctly, in the back of the car.

Q. The back of the head? A. No, no, I saw—well, I saw the back of the head and also part of the front because the inside of the car was dark, otherwise I would have seen their faces.

Q. So you could just see the back of the head

from where you were standing? A. Just the man in the back.

Q. Did he have his hair parted in the middle? A. His hair was combed back slick.

Q. Did he have his hair parted in the middle? A. I would have to be on top of him to see that.

Q. And you could see that his hair was combed back from where you were? A. Yes.

Q. And this car passing by with this terrific speed, on this fleeting glance, you could tell that
611 his hair was combed back slick? A. It was not windblown.

Q. It was not windblown? A. No.

Q. This was a cold day in February? A. Yes, quite a cold day.

Q. Kind of windy, wasn't that neighborhood, around that time of the year? A. Not too windy that day.

Q. Not too windy, on February 15th, around Coney Island, around 11 o'clock at night? A. That is why we took this walk instead. We were going to the movies that night and we had started to walk towards Feltman's because it
612 was such a nice clear night.

Q. And it was a cool night, wasn't it? A. Yes, it was a cool night.

Q. What? A. Yes, sir.

Q. You spoke this matter over with detectives a number of times, haven't you? A. When I was called down—

Q. Did you, Yes or No? A. No.

Q. Never spoke to the detectives about this case? A. They asked me what I knew about the case.

Q. Which detectives did you talk to? A. Well,

there was one man from the District Attorney's office that came to my house.

Q. Do you know his name? A. It is L—something—not offhand.

Q. Well, there came a time when detectives asked you whether or not you could identify anybody, didn't they? A. Yes.

Q. And you looked over many persons, didn't you, Yes or No? A. No.

Q. You never looked over anybody? A. Only the day that I was taken down; that was—I 614
think it was the second night, the night after the murder, when two officers came and took me down to Police Headquarters in New York and asked me to give a description of the men.

Q. Well, now, Mr. Gimbel, from February 15, 1941, up to the present time, how many detectives did you talk to about this case? A. Not very many. Well, there was this detective from the District Attorney's office that came to my house.

Q. Can't you tell us how many you spoke to? Was it five or six or seven or ten? A. Well, 615
from the very beginning, the night of the murder, I was taken to the Police Headquarters—

Q. I am asking you— A. You want to know how many detectives.

The Court: He is trying to figure it out.

Q. Let him figure out in his own mind and tell it to us. A. There were quite a number of detectives down at the Coney Island Police Station that night and I spoke to them and I gave them

a description. I gave them the story I am telling you right now, and as for the identification of the men, they took me down the very next day, that was two more detectives, and asked me to identify and see if I could identify any men, and I looked through the files—

Q. Just stop right there. You did not identify anybody, is that the answer? A. My description still stood.

Q. I say, you did not identify anybody, did you? A. No, sir.

By the Court:

Q. You did not see the faces of any of the men, did you? A. No, sir.

Mr. Solovei: That is all.

Cross-examination by Mr. Morritt:

Q. Did I understand you to say that from where you were, you got the impression that the person driving the car could not touch the pedal with his foot? A. He was touching the pedal all right but he was trying—the way he was hunched over the wheel and bending down, I have seen small drivers—

Q. I did not ask you that. A. That was my impression, that he was having a time driving the car.

Q. Did you testify before this Court and jury that you had the impression that the driver could not touch the pedal; that he was so small? A. I told the jury that the driver was having a time touching the pedal of the car.

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Q. You got the impression from where you stood? A. Yes.

Mr. Morritt: That is all.

Mr. Geoghan: No questions.

Mr. McGough: That is all, step down, Mr. Gimbel.

PRIVATE AUGUST A. HOLLINGSWORTH, residing at 43 Chestnut Street, Brooklyn, N. Y., called as a witness in behalf of the People, being first duly sworn by the Clerk, Mr. Jehle, testified as follows: 620

Direct examination by Mr. McGough:

Q. You are a Private in the United States Army, Mr. Hollingsworth? A. Yes, sir.

Q. And did you come from Camp Funston, in the State of Kansas, at the request of the District Attorney to testify here today? A. Yes, sir. 621

Q. In February of 1941, where were you living, please? A. 43 Chestnut Street.

Q. And that time did you own an automobile? A. Yes, sir.

Q. Tell this Court and jury what type of car you owned at that time. A. It was a 1936 Ford, V8, four-door convertible sedan.

Q. What color and what kind of roof did it have? A. It was blue in color and had a tan canvas roof; brown canvas roof.

Q. Now for the year 1941 did you have New York license plates for that car? A. Yes, sir.

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Q. What were the license plate numbers, please? A. 6Q5923.

Q. Now at about what hour on the 15th of February, 1941, did you last see that car? A. About nine o'clock.

Q. 9 p.m. or 9 a.m.? A. 9 p.m.

Q And when you say you saw that car the last time on the 15th of February, where did you see it? A. What was that, sir?

623 Q. Where did you see it? A. At the northwest corner of Pine and Fulton Street.

Q. Is that in the Borough of Brooklyn, County of Kings? A. Yes, sir.

Q. And after you left it there at that hour, 9 o'clock, when did you come back to get it again? A. About 11 o'clock; 11 p.m.

Q. Did you see the car at 11 o'clock that night? A. No, sir.

Q. Did you do anything about the car? A. Yes, sir, I telephoned to the 75th Precinct and they told me—

624

Mr. Solovei: I object to anything this man did.

Q. Don't tell us what you said or what they said. You notified the police, is that right? A. Yes, sir.

Q. And sometime later that night did the police get in touch with you? A. Yes, sir.

Q. Did you go anywheres with them? A. Yes, sir.

Q. Where, please? A. The 60th Precinct, Coney Island.

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Q. And where is that located in Brooklyn, if you know? A. Coney Island, somewhere.

Q. Did you see your car again after the police notified you late that night? A. Yes, sir.

Q. Where did you see the car? A. At the 60th Precinct.

Q. Can you tell us about what time that was? A. I believe about four o'clock, 4 a. m. in the morning.

Q. When you parked the car at Pine and Fulton Streets, in the Borough of Brooklyn, did you have the ignition locked? A. Yes, sir. 626

Q. When you saw the car again later that day in Coney Island, was the ignition also locked? A. The wires were crossed on it.

Q. The wires were crossed on it? A. Yes, sir.

By the Court:

Q. The District Attorney asked you if the ignition was still locked? A. There was no key there in it. I believe it was locked. 627

By Mr. McGough:

Q. Did you notice any difference in the appearance of the car at the time you saw it on the early morning of the 16th of February, compared with when you saw it last on Saturday night, the 15th at 9 p. m.? A. Yes, it was covered with fingerprint powder.

Q. Yes? A. And the license plates were bent down.

Q. When you say the license plates were bent

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down, what do you mean? A. They were bent forward, away from the car.

Q. Both the front and the rear? A. Yes, sir.

Q. Had you left them in that condition? A. No, sir.

Q. What else, if anything? A. Well, the wires were crossed and there were two holes in the car.

Q. Where were the holes, if you remember?
629 A. I believe one was in the right front fender and one was in the hood.

Q. Were there two holes, or one hole and a mark? A. One was like a tear or rip, and one was an indentation. It was not all the way through.

Q. Did you ever have any shells or bullets in that car at any time?

Mr. Solovei: I object to the question.
The Court: Objection overruled.
Mr. Solovei: Exception.
630 The Witness: No, sir.

Q. Did you ever have that car returned to you? A. No, sir.

Q. Have you seen that car recently? A. Yes, sir.

Q. How recently? A. On Friday.

Q. Friday of last week? A. Yes, sir.

Q. And where was the car when you saw it last Friday?

Mr. Carabba: I object to that as incompetent, irrelevant and immaterial, where it was when he saw it.

631

The Court: Objection overruled.
Mr. Carabba: Exception.
The Witness: In the Property Clerk's Office, at Meeker Avenue.

Q. At the Meeker Avenue Garage? A. Yes.
Q. You and I and some men went out and looked at it?

632

Mr. Carabba: I object to that as leading.
The Court: Objection overruled.
Mr. Carabba: Exception.

Q. And that is your car? A. Yes, sir, but the insurance company owns it now.
Q. Is that your car that you had on the 15th of February? A. Yes, sir.
Q. I show you People's Exhibit No. 11 in evidence, and ask you if that is a photograph of your car as it appeared on the 15th day of February 1941? A. Yes, sir.

633

Q. Were those marks that you see on the front of the car there when you last parked that car at 9 p. m. on the 15th of February at Pine and Fulton Streets in the Borough of Brooklyn? A. No, sir.
Q. You say that was a four-door convertible sedan, is that right? A. Yes, sir.
Q. Were the doors in working condition, Mr. Hollingsworth? A. All but one.
Q. All but one? A. Yes, sir.
Q. Which one was not in working condition? A. The right rear door.
Q. What was wrong with the right rear door of your car? A. It used to catch upon opening.

634 *Pvt. August A. Hollinsworth—For People—Cross—Redirect*

Q. You mean it was a little stiff and hard to work? A. Yes, sir.

Mr. McGough: Your witness.
Mr. Solovei: No questions.

Cross-examination by Mr. Meadow:

Q. Did the ignition in that automobile also lock the steering wheel? A. Yes, sir.

635 Q. You say that when you left the automobile the ignition was locked, is that right? A. Yes, sir.

Mr. Meadow: That is all.
Mr. Geoghan: No questions by Indovino.

By the Court:

Q. Did you have the key in your pocket when you locked up the ignition? A. Yes.

636 *Redirect examination by Mr. McGough*:

Q. When you left the car there and you put the key in your pocket, did you also have another set of keys hidden on the car? A. Yes, sir.

Q. And where did you have them hidden? A. In the chassis.

Q. And last Friday, when you and I went out to the Meeker Avenue Garage, did you find them hidden in the same spot? A. Yes, sir.

Q. Have you got them in your pocket now? A. Yes.

Q. Where are they? A. Right here.

Q. Are they the keys you took from the car last Friday down there in the garage? A. Yes, sir.

Q. Did you try them in the car and see if they worked? A. I tried them in the trunk lock.

Mr. McGough: I offer them in evidence.

Mr. Geoghan: I object to it.

Mr. McGough: All right, I will withdraw it if there is any objection.

Mr. Geoghan: All right. 638

DETECTIVE JOHN TRUSCH, Shield No. 860, attached to the Ballistic Bureau, Police Department, City of New York, called as a witness in behalf of the People, and being first duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. You are a detective in the Police Department here in the City of New York? A. I am. 639

Q. And how long have you been a member of the Police Department, Mr. Trusch? A. Over 17 years.

Q. And during that period of time how long have you been a member of the Detective Bureau? A. Since 1938.

Q. And what is your command or detail, please? A. I investigate all the shootings in the five boroughs on my tour of duty; at the scene

640 *Det. John Trusch—For People—Direct*

of the shooting I make a search for spent bullets and discharged shells, and examine clothing.

Q. In other words, you are a ballistic detective, is that right? A. That is right.

Q. Now give this jury a brief description of ballistics, please. A. Well, that is the science of bullets, projectiles in flight, and we make a search for spent bullets and discharged shells and examine clothing; examine firearms.

Q. Now on the 15th day of February 1941,
641 did you receive a call to go to 12th Street and Surf Avenue in the Borough of Brooklyn? A. Yes, I did.

Q. And did you proceed to that particular place? A. I did.

Q. What time did you arrive there, Detective Trusch? A. I arrived there at 12:15 a. m. on February 16, 1941.

Q. Did you see Patrolman Leon Fox there at that time? A. No, he was not there.

Q. How long did you spend at that particular location? A. About 15 minutes.

642 Q. And where did you go from there? A. To the Coney Island Hospital.

Q. And did you see Patrolman Leon Fox at the Coney Island Hospital? A. I did.

Q. Did you examine the clothing of Patrolman Leon Fox at the hospital? A. Yes, I did.

Q. Will you tell us, please, whether or not you examined the winter overcoat of Patrolman Leon Fox on that night? A. Yes, I did.

Q. Will you tell us, please, what, if anything, you found upon examination of the same? A. I found—

Mr. Solovei: I object to this line of testimony on the ground that it is highly improper and incompetent, irrelevant and immaterial, and adds nothing to the People's case. You have the testimony of the doctor here, who says that Fox was shot and killed on the night of February 15, 1941. Nobody disputes it. Nobody questions it, and this line of testimony is only for the purpose of inflaming the minds of the jury. 644

The Court: Wasn't there some cross-examination by one of your colleagues of the doctor as to where the holes were and where the bullets went? Objection overruled.

Mr. Solovei: I take an exception.

Mr. Geoghan: I join in that motion also. Nobody disputes the fact that Patrolman Fox was killed.

The Court: Objection overruled. One of counsel went into an elaborate examination of the location of the bullet holes on the body of the deceased. Now, what counsel had in mind, I don't know. 645

Mr. Geoghan: I will tell you that he certainly does not dispute the death.

The Court: I suppose counsel had an objection in asking those questions.

Mr. Meadow: I did not say, your Honor—

The Court: Objection overruled.

Mr. Meadow: The defendant Rudish excepts.

The Court: Exception to the defense;

proceed. If that cross-examination had not been made, I would not have permitted this line of examination.

Mr. Meadow: I did not hear the testimony.

The Court: You have your exception. Proceed.

By Mr. McGough:

Q. I am talking of the overcoat. A. Yes.

Q. Tell us what, if anything, you found upon examining the overcoat. A. I found a bullet hole on the left side.

Mr. Solovei: I object to this line of testimony.

The Court: Objection overruled.

Mr. Solovei: And upon the further ground, if your Honor pleases, as far as the defendant Malinski is concerned, for the purposes of this record, the defendant Malinski, through counsel, now concedes that on February 15, 1941, the Police Officer Fox was shot and killed in the Borough of Brooklyn.

The Court: Now, Mr. District Attorney, please do not exhibit the coat.

Mr. McGough: I am not, Judge.

The Court: I will permit you to ask what the Officer found on examination of the coat.

Mr. Geoghan: I want to make the same concession on the record on behalf of Indovino. We concede the death of Leon

Fox by a bullet on the night of February 15th.

Mr. McGough: Will they concede that it was fired at a space of not more than four inches?

Mr. Geoghan: We make no such concession.

Mr. Carabba: I make the same concession on behalf of the defendant Rudish, that the Police Officer Fox was killed.

The Court: The District Attorney says 650
he desires to establish that the shooting occurred when the firearm was about four inches from the deceased policeman.

Mr. Geoghan: It does not make any difference where he was shot from.

The Court: I do not know what the District Attorney has in mind.

Mr. Geoghan: You have a dead officer and we concede it.

The Court: All right; proceed, Mr. District Attorney.

By Mr. McGough: 651

Q. Now may I have an answer to that last question. A. There was a bullet hole on the left side front of the overcoat, 27 inches up from the bottom and 9 inches from the left side seam, and it has a powder area of about 3½ inches around that bullet hole.

Q. When you say "powder area", will you tell us in layman's language what that means? A. Powder burn. That shows that the muzzle flash of the gun was close to the material caus-

ing a certain amount of burning and scorching of the material around the hole.

Q. Can you tell us from the examination of the coat how far the muzzle of the gun was held from that particular coat? A. Well, in my opinion, about 6 or 8 inches away.

Mr. Solovei: May I have an objection to that?

653 By the Court:

Q. Will you state that with reasonable certainty? A. Yes, your Honor, I have made considerable amount of tests at the Ballistic Bureau and in my opinion it was about 6 or 8 inches away.

Mr. Solovei: May I have a general objection so I do not have to rise, to this line of testimony, upon the ground that it is improper, and incompetent, in view of my concession, and I object to it and
654 I take an exception.

The Court: You have it.

Mr. Geoghan: I make the same general objection in view of the concession I made, in behalf of the defendant Indovino.

Mr. Carabba: Likewise on behalf of the defendant Rudish.

The Court: You have it. Let the record show that at no time was the garment of the police officer exhibited.

Mr. Geoghan: May it be shown on the record that it was carried in before the jury and placed right under the table.

The Court: There was some object carried in and placed under the table.

Mr. McGough: May the record show that I did not even see it myself, if it please the Court.

The Court: Proceed, please.

By Mr. McGough:

Q. Detective Trusch, will you tell us, please, what, if any other markings, you found on the Patrolman's overcoat. A. There was a bullet hole through the flap on the right front and there was a bullet hole in the rear of the coat; in the rear center. 656

Mr. McGough: That is all.

Mr. Geoghan: No questions.

Mr. Carabba: No questions.

Mr. Solovei: No questions.

Mr. McGough: If your Honor pleases, I am going into some long witnesses at this time and I would like to adjourn now for the day. I think we did a pretty good day's work up till now. 657

The Court: You are not prepared to proceed at this time?

Mr. McGough: I will need an hour and a half or two hours before I can proceed and I do not want to ask the Court to continue that long, with the next witness.

The Court: Have you gentlemen any objection to adjourning at this time?

Mr. Geoghan: No.

The Court: Gentlemen of the Jury, we

658 are about to take a recess until tomorrow morning. I must admonish you as I am required by law, not to discuss the case, either among yourselves or with any other person. Do not permit anyone to speak about this case in your presence. Please refrain from reading anything in the public press if there should be any mention of the case. You must keep your minds open. Do not form or express any opin-
659 ion or conclusion as to the guilt or innocence of these defendants on trial, or either of them or any of them, until the case is finally submitted to you for your consideration after a charge by the Court on the law. You will retire now and return here promptly tomorrow morning at ten o'clock, and we will proceed with the trial at that time. The jury will retire.

(The jury retires from the courtroom.)

The Court: The defendants are re-
660 manded.

Recess until 10 a. m., June 16, 1943.

AFTER RECESS. 10 A. M.

Brooklyn, N. Y. June 16, 1943.

TRIAL RESUMED.

DAVID YELLIN, Sing Sing State Prison, called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

662

Direct examination by Mr. McGough:

Q. Now, your name is David Yellin; right? A. Yes.

Q. You gave the clerk your address as Sing Sing Prison? A. Yes.

Q. How old are you Yellin? A. Twenty-eight.

Q. And when were you committed to Sing Sing Prison? A. December 12, 1941.

Q. Sentenced, please, from what County? A. From New York County.

Q. On a charge of what, please? A. Robbery.

663

Q. Was that robbery with a gun or robbery unarmed? A. I think it was robbery armed.

Q. What sentence are you serving in Sing Sing on that charge? A. I am serving from ten to twenty years.

Q. Ten to twenty years in Sing Sing? A. Ten to twenty years in Sing Sing.

Q. In October, 1937, were you convicted of another crime? A. Yes.

Q. Was that assault in the third degree? A. Yes.

Q. Did that arise out of a sex offense against a girl? A. Yes.

Q. Did you go to prison on that charge? A. No.

Q. I want you to look at these three defendants, Malinski, Rudish and Indovino; will you tell this Court and jury whether you are acquainted with those three men? A. Yes; I am.

Q. How long do you know Indovino? A. About two and a half years now.

665 Q. Did you know him under any other name besides Joseph Indovino? A. Yes.

Q. Tell us what it was? A. Joe Tiger.

Q. How long do you know Morris Malinski? A. The Summer of 1940.

Q. Do you know him under any other name besides Morris Malinski? A. Mersh.

Q. Mersh Malinski, is that right? A. Yes.

Q. How long do you know Sidney Rudish? A. Oh, anywhere from 12 to 15 years.

Q. Do you know him by any other name except Sidney Rudish? A. Jake.

666 Q. Jake Rudish? A. Yes.

Q. Did you know a man by the name of Abraham Beitler? A. Yes.

Q. How long did you know him? A. Knew him about 15 years, too.

Q. Did he have any nicknames? A. Yes; Ebbie.

Q. Ebbie Beitler? A. Yes.

Q. Do you recall the day that Patrolman Fox was shot and killed in Coney Island? A. Yes; I do.

Q. Will you give us the date, please? A. February 15, 1941.

Q. With that day in mind, please, can you tell me whether or not you met Indovino about that time? A. Yes; I did.

Q. Can you tell us about when it was, approximately, when it was? A. It was the early part of the week before the 15th, about, I would say, on Tuesday or Wednesday.

Q. At what place did you meet him? A. In front of an Auto Rental Store on First Street between Avenue A and First Street.

Q. Would that be in New York County? A. 668
Yes.

Q. Was anybody there at the time that you met Indovino? A. Yes; I was introduced to him by Ebbie.

Q. By Ebbie Beitler, you mean? A. Ebbie Beitler, yes.

Q. When Beitler introduced you to Indovino, what did he say? A. He said—

Mr. Solovei: I object to this as far as Malinski is concerned.

Mr. Geoghan: Also as far as Indovino 669
is concerned.

The Court: Sustained.

Mr. Carabba: I make the same objection on behalf of the defendant Rudish.

The Court: At this time the testimony is received with reference to Indovino. Do you object to it, Mr. Geoghan?

Mr. Geoghan: I did object to it; yes.

The Court: Your objection is overruled.

Mr. Geoghan: Exception.

Mr. Carabba: I make the same objec-

670 tion, if your Honor please, in so far as the defendant Rudish is concerned.

The Court: Sustained.

Mr. Solovei: Your Honor has not ruled on my objection as to Malinski, I don't think.

The Court: Sustained.

By Mr. McGough:

671 Q. I asked what did Beitler say when he was introducing you to Indovino? A. He said, "Joe Tiger, Davie Yellin, a friend of Slip's."

Q. Who is Slip, please? A. Slip is Nathan Spielfogel.

Q. Was Slip Spielfogel a friend of yours? A. Yes; he was.

Q. Do you know if he was also a friend of Beitler's? A. Yes.

Q. Do you know if Spielfogel was a friend of Mersh Malinski?

Mr. Solovei: I object.

672

A. Yes.

The Court: Overruled. If you know of your own knowledge you may testify.

Mr. Solovei: Exception.

By Mr. McGough:

Q. Now, Mr. Yellin, at that time and at that place, in the presence of Beitler, did Indovino have a conversation with you? A. Yes.

Q. Will you tell the Court what he said, please,

and what, if anything you said to him at that time?

Mr. Solovei: I object to that on behalf of the defendant Malinski.

Mr. Carabba: I make the objection on behalf of the defendant Rudish.

The Court: Sustained in each instance at this time.

A. He called me as I was walking by, and I walked over to him. 674

Mr. Solovei: Your Honor is sustaining the objection. Do I understand that you are sustaining the objection to permit the evidence to go in?

The Court: I am sustaining your objection, sir, and I am allowing this evidence in as to Indovino.

Mr. Morritt: I respectfully ask the Court—

The Court: Whom do you represent?

Mr. Morritt: Rudish, your Honor. 675

The Court: Counsel for Rudish has spoken.

Mr. Morritt: I would like the Court to instruct the jury to disregard any conversation or any acts when your Honor has made a ruling specifically, that the jury will understand, your Honor, that it is not applicable at all to the defendant Rudish and to the other defendant; and that as far as humanly possible, they should strike it from their minds, and that when your

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Honor makes that ruling it is utterly without effect, legally or otherwise, upon the defendants whom I named.

The Court: The jury is so instructed. Proceed.

A. Ebbie called me as I was walking by, and I walked over to Ebbie, and he introduced me to Joe Tiger, saying, "Joe Tiger, Dave Yellin, a friend of Slip's." Then he told me, he says,
677 "This fellow has got something good out in Coney Island." I asked him—he asked me—he told me he wanted me to deliver this message to Slip, and he started to tell me about—then Joe Tigor chimed in, and he told me, he started explaining the trick to me and he told me it was—

Mr. Geoghan: Just a minute. When he says "he" whom does he mean?

A. Indovino.

678 Mr. Geoghan: I object to any conversation between Beitler and this defendant as affecting Indovino.

A. (Continued) I am speaking of the conversation between—

Mr. Geoghan: What is that?

A. (Continued)—I had with Indovino.

Mr. Geoghan: Yes; but he is saying "he". I cannot tell whether he means Beitler or whom.

By Mr. McGough:

Q. Take your time, sit back and relax, and give us the name, and give us the exact words that they used so far as you recall?

Mr. Carabba: May I ask your Honor respectfully to have this witness speak a little louder? We are having trouble hearing him.

The Court: I am having a little trouble hearing him myself. (The Court directs the witness to talk louder and explains to him why he should talk louder.) 680

A. (Continued) Indovino started explaining the details of the job out in Coney Island. He told me that it was the manager of a bank who takes the day's receipts to the bank, a few blocks away. He said, the neighborhood was as dead as Kelsey's Nuts. He says it is a cinch job.

By the Court:

681

Q. Did he say it was the manager of a bank? A. Manager of a theater. He says, the neighborhood was dead, and it would be a cinch job. He told me that the money was escorted by a policeman who walked with him, but they did not have to worry about the policeman, because he was not looking to get killed, he would give up as fast as anybody. He gave a few more details—

Mr. Geoghan: I object to the generality.

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Mr. McGough: I consent that it be stricken out.

The Court: Sustained. What did he say?

A. He was telling us about what time the money—

The Court: Tell us what he said.

683 By Mr. McGough:

Q. Give us the words, please. A. (Continued) —that he said the money left at about 11 o'clock, left the theater about 11 o'clock. He told them just where to park the car. I don't know Coney Island very well, so I cannot tell you just the street he wanted to park the car on. And then we got through with that conversation. Ebbie told me, he says, "When you see Slip tonight, tell him I want him to go on the thing with me, and tell him what it is all about." I told him I would, and I left.

684 Q. In the time that Indovino spoke to you at that time, did he mention any amount of money?

Mr. Solovei: I object to the question on the ground it is leading.

The Court: Well, yes, it is.

Mr. Solovei: I renew my objection to all of this line of testimony, upon the ground it is highly improper, incompetent, irrelevant, not binding upon the defendant Malinski.

The Court: Sustained at this time.

Mr. Carabba: I make the same motion.

The Court: Sustained as far as your client is concerned at this time.

By Mr. McGough:

Q. You told us a conversation. I am going to ask you at this time, Is that the complete conversation, or do you recall any more details of what Indovino said at that time? A. Yes, I do. Indovino said there would be about a thousand dollars for that night—it was a busy night—there would be about a thousand dollars. 686

Q. Was anything said about whether or not he would go on the venture?

Mr. Solovei: I object to that.

Mr. Carabba: I make the same objection, your Honor, the District Attorney knows that is leading, and highly improper.

Mr. Geoghan: I join in that objection.

The Court: You are really the aggrieved party, and the others are making the objection. 687

Mr. Geoghan: I know that, but I am going to go further. I am going to ask your Honor to counsel the District Attorney not to ask a leading question first, and then withdraw it and ask a general question; because he is putting the answer in the mouth of the witness.

Mr. Solovei: That has been done all day yesterday and it is being done today.

688

The Court: I don't want any speeches from you, I said. Don't you tell me what happened yesterday. If you have an objection, make it.

Mr. Solovei: Yes, I have.

The Court: Make it.

Mr. Solovei: I have an objection. I ask your Honor to instruct the District Attorney not to ask a leading question and then withdraw it, and then ask whether there was any further conversation.

689

The Court: All right now; be seated.

Mr. Solovei: Yes.

The Court: The District Attorney is so instructed.

By Mr. McGough:

Q. Mr. Yellin, do you recall any more of the conversation had between you and Indovino at that time? A. Yes; there was some more conversation. Indovino said that he could not go on that trick because he was too well known out in Coney Island in that section.

690

Q. What do you believe the word "trick" means?

Mr. Solovei: I object to it.

The Court: Sustained as to form.

Q. Do you understand what he meant when he said "trick"? A. Yes.

Mr. Geoghan: That is objected to.

The Court: Sustained as to form, not as to substance, but as to form.

Q. When he mentioned the word "trick", did you understand what he meant?

Mr. Geoghan: I object to it.

The Court: I have just sustained an objection to that question, only as to form.

692

Q. What did you understand him to mean by that particular word?

Mr. Geoghan: Objected to.

The Court: Sustained as to form. It is the same question with a couple of words changed.

By the Court:

Q. Did you ever hear the word "trick" mentioned before? A. Yes. A trick is a holdup.

693

Mr. Geoghan: Just a minute.

The Court: Wait a minute. Strike this out.

Mr. Carabba: I ask it stricken out.

By the Court:

Q. Over what period of time have you heard the word "trick" mentioned? A. Oh, any number of years.

Q. Where, in what circles?

Mr. Geoghan: I object to the question.

The Court: Overruled.

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Mr. Solovei: I object to your Honor's question.

The Court: Overruled.

Mr. Carabba: May I have an objection?

The Court: Overruled.

Mr. Carabba: May I have an exception?

The Court: Yes.

A. Among hoist men, gunmen.

Q. What is a hoist man? A. A hoist man is a
695 holdup man.

Mr. Solovei: I object to your Honor's question and I object to the answer.

The Court: Overruled.

Mr. Solovei: In view of the answer and the question, I ask for the withdrawal of a juror and a mistrial.

The Court: Your motion is denied.

Mr. Geoghan: I do also.

The Court: Motion denied.

Mr. Carabba: May I make the same motion?

696 The Court: Motion denied.

Mr. Carabba: May I have an exception?

The Court: You may. Proceed.

By Mr. McGough:

Q. Did you see Spielfogel that night? A. Yes; I did.

Q. Did you have a talk with him? A. Yes.

Q. Where did you see Spielfogel that night? A. I met Spielfogel in the candy store at the corner of Avenue D and Seventh Street.

Mr. Geoghan: I object to this question, the question and answer; affecting Indovino, whether they met or had a conversation means nothing.

The Court: As far as Indovino is concerned the objection is overruled.

Mr. Geoghan: I except.

The Court: The objection is sustained as far as the other defendants are concerned.

Mr. Carabba: I object on behalf of the 698
defendant Rudish.

The Court: I would be glad to hear you, Mr. Geoghan on the question of law, in the presence or not in the presence of the jury, as you choose.

Mr. Geoghan: No, I make my objection, your Honor has ruled, and I take an exception.

The Court: No, Mr. Geoghan, this is not catch-as-catch-can. I would be glad to hear you, if you have any law you want to present to the Court, if you have any argu- 699
ment you wish to make on this proposition of law; I will exclude the jury and hear you at length.

Mr. Geoghan: No.

The Court: All right, gentlemen, retire a few moments. Don't discuss the case; keep your minds open. If the Court is wrong, the Court will change his ruling. It is not catch-as-catch-can.

Mr. Geoghan: It is a general objection. There is no catch-as-catch-can about it.

The Court: Step out, gentlemen. I will hear counsel on the question of law.

(The jury retired from the room.)

Mr. Solovei: I would like to have the witness excluded while your Honor is hearing the argument on the question of law.

The Court: Sit down. (To the court officer) Take the witness in the side room.

(The witness was taken into the side room and the door was closed.)

(Argument was had in the absence of the jury, and several authorities were examined.)

The Court: Do you still press the objection that it is not binding on Indovino?

Mr. Geoghan: Yes; I do press the objection,

Mr. McGough: Now; so I will understand: Your Honor is ruling that all these conversations had, with any one of these defendants on trial—anything that relates to them, whether in their presence or without, is going to be competent?

The Court: You have not connected the other two yet.

Mr. McGough: I know; I just want a ruling now.

The Court: If you connect them, then I will rule on them. But thus far all of this has no bearing on either Malinski or Rudish.

Mr. McGough: That is understood.

The Court: The only man involved thus far is Indovino.

Bring back the jury.

(The jury were brought back to the room.)

The Court: The objection is overruled and counsel has an exception. The testimony is received only with reference to Indovino. The objection to the testimony is sustained as far as the other defendants are concerned.

Mr. Carabba: Will your Honor instruct the jury.

The Court: I wil make one instruction 704
now that will take care of it throughout the trial.

Mr. Carabba: All right, Judge.

The Court: (To the jury) Where testimony is stricken out or objections are sustained to certain testimony as against any one or more defendants, the jury must disregard that testimony as against the defendant or defendants referred to. If it is received only as against one defendant it must apply only to that defendant, or, as against two defendants, only as against 705
those two defendants. Of course, if it is received as against all defendants, then you will apply it as against all of them. This testimony is received at this time—I say "at this time"—only as against the defendant Indovino. That is the only defendant we are talking about at this time. You gentlemen will bear that in mind. Is that instruction satisfactory to counsel?

Mr. Carabba: Satisfactory, your Honor, as far as the defendant Rudish.

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By Mr. McGough:

Q. Now, Mr. Yellin, when you spoke to Spielfogel at that time, did you mention Indovino? A. Yes.

Mr. Geoghan: Again I object to counsel leading the witness.

The Court: Sustained.

Mr. McGough: Merely preliminary.

707 Mr. Geoghan: Those preliminaries, Judge, simply suggest the answer.

By Mr. McGough:

Q. You told us you had a talk that night, is that right? A. Yes.

Q. Will you please state the conversation, what you said and what Spielfogel said in return to you? A. I met Spielfogel that night in the candy store at the corner of 7th Street and Avenue D, and I delivered the message of the conversation I had had with Indovino and

708 Beitler.

Q. Will you give us the conversation now?

Mr. Solovei: I object as to the defendant Malinski.

The Court: Is there any necessity for that?

Mr. Solovei: I think there is.

The Court: I have already ruled that this testimony is received only as against Indovino. Your record is amply protected. This testimony is not received as against

Malinski or as against Rudish. I cannot make it any more clear than that.

Mr. Solovei: I still think that it is objectionable in spite of your ruling, your Honor.

The Court: I am sustaining your objection. Objection sustained. What else do you want me to do?

Mr. Solovei: As far as I am concerned, your Honor, if you ask me, I say that this witness's testimony at the present time is 710
so prejudicial as against the defendant Malinski, in spite of the fact that your Honor instructed the jury, that I doubt whether or not it could be humanly possible to eliminate it from their minds.

The Court: He hasn't said a word about Malinski or about Rudish thus far. Proceed.

A. I spoke to Natie—I met Natie that night and I told him that Ebbie had something good, Ebbie and another fellow by the name of Joe Tiger—I told him I had been introduced to—had 711
something good out in Coney Island, and gave him the details.

The Court: What did you say to him?

Q. Tell us the words used. A. I told him that it was a soft touch; there was a cop that escorted the day's receipts from a theater to a bank which was a couple of blocks away, and it would be a soft touch in spite of the cop, because the cop would give up quick; it was a lonely neighborhood and he was not looking to be killed. And

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Spielfogel said to me, he says,—he asked me, "Who was there with Beitler?" So I repeated and told him Joe Tiger.

Q. Did Spielfogel say anything else? A. He told me, he said, "Who? Joe Tiger?" he said, "I would not step with that ginny."

Q. Is that all the conversation that you recall? A. He went on to say that he would not go out on anything that Indovino—that Joe Tiger knew about—he called him Joe Tiger.

713 Q. Now, Yellin, do you recall Saturday night, the 15th of February, 1941? A. Yes; I do.

Q. Where were you at about the hour of midnight or one a. m. that particular day? A. On that Saturday I was playing poker in a candy store on 8th Street between C and D.

Q. Did you see Rudish at any time that night? A. Yes; I saw Rudish at about one o'clock.

Q. Where did you see him? A. I was in the candy store and he called me—he called into the candy store and motioned me to come out.

Q. Did you go out of the candy store after he motioned to you? A. Yes; I did.

714 Q. Did you have a talk with him then? A. Yes.

Q. Will you please tell us what was said? A. He was all excited. He told me that he had just come back from a trick in Coney Island and he says Ebbie—he says Ebbie and Mersh just shot a cop.

Mr. Solovei: I object to that.

Mr. Carabba: I ask it stricken out, your Honor, as incompetent, irrelevant and immaterial.

The Court: The testimony is received

with reference to the defendant that is alleged to have made the statement, and not as to either of the other defendants.

Mr. Geoghan: I object to it as to Indovino.

The Court: As to Indovino, sustained; as to Malinski, sustained.

By Mr. McGough:

Q. Was that all the conversation Rudish had with you at that time? 716

Mr. Solovei: May I ask the latter part of his answer be stricken out?

The Court: As far as Malinski and Indovino are concerned the answer is stricken out. The testimony is received only as against the defendant Rudish.

Q. How long were you talking to Rudish at that time? A. I was talking to him about ten minutes.

Q. Please will you tell us whether there was any more of the conversation? A. Yes; he told me that he had had a narrow escape, they had a tough time getting away, the car was an old shillelah; it went a couple of blocks, the damn thing could not go so they stopped it, jumped out and he ran up on the "L" station and went home by train. 717

Q. What else, if anything—

Mr. Geoghan: I don't know if it is necessary for me to be objecting right along,

but I assume all this testimony is not received as to Indovino.

The Court: Correct.

Q. Do you recall any more of the conversation? A. He asked me whether his wife had been around that night and I told him I had not seen her; and he told me, he says, "Well, I have got to duck the pieces," and he slapped his pocket. He said, "I have got to meet Ebbie and I am going to duck
719 the pieces." He asked me if I needed any money; I told him no, I says I had enough; and I went back in the candy store and he left.

Q. Will you stand up and illustrate and just show us how he slapped his pocket? A. He was wearing a black lumberjack about this long. The pockets were right here. He slapped his pockets. He said, "I got to meet Ebbie and duck the pieces."

Q. Will you describe how the pocket looked where he touched it, please? A. He had two bulges, one on each side, in each pocket, it bulged
720 out.

By the Court:

Q. What is the meaning of the word "pieces"? A. A piece is a gun.

Mr. Solovei: Object to that.

The Court: Overruled.

Mr. Solovei: Exception.

Mr. Carabba: I make the same objection in behalf of the defendant Rudish.

Mr. Geoghan: Same objection as to Indovino.

721

The Court: Overruled.
Exceptions.

By Mr. McGough:

Q. I don't want to lead you, Mr. Yellin, but I want you to tell us whether there was any more of the conversation had that night, as you recall? A. (No answer).

Q. Do you recall the first words that Rudish used when he started to speak to you that night? A. Yes; he said, "Jesus Christ, we just had a narrow escape." Then he went on to tell me about the narrow escape.

722

Q. Will you tell us what words he used, please?

Mr. Carabba: He has already repeated it, your Honor.

Q. Try not to repeat anything you have already given us.

The Court: Proceed.

723

A. He said, "Jees, we just had a narrow escape." He says, "Ebbie and Mersh just shot a cop." Those were the first few sentences he said.

Q. When he mentioned money to you at that time did he show you any money? A. Yes; he took out some money. He said, "I got over two bills here."

Q. How much money was that? A. That is over two hundred dollars.

Q. At about eight o'clock that night did you

724 see—eight o'clock on the evening of Saturday the 15th of February, did you see this defendant Malinski anywheres? A. Yes; I saw that evening on the corner of 7th Street and Avenue D. He was with Spielfogel.

Q. Did he have anything with him?

Mr. Solovei: Objected to.
The Court: Overruled.
Mr. Solovei: Exception.

725 A. What day was that?

Mr. Solovei: I object to the District Attorney giving this witness any answer.
The Court: Overruled.
Mr. Solovei: Exception.

Q. I asked you, Mr. Yellin, if you saw Malinski at any time on the evening of Saturday the 15th of February, 1941, if you remember? A. The evening of Saturday, yes, I saw him about eight o'clock.

726 Q. Was he alone or was he with somebody else? A. He was alone when I saw him.

Q. You said before that he was with Spielfogel. Were you mistaken as to the date? A. Yes; I was mistaken as to the date. I thought you had said Sunday.

Q. Did you see Malinski and Spielfogel together on Sunday the day following the 15th? A. Yes.

Q. On the evening of the 15th how was the defendant Malinski—alone? A. Yes.

Q. At about what hour and what place, please?

A. At about eight o'clock near the candy store at 376 East 8th Street.

Q. Did you see him carrying anything? A. Yes.

Mr. Solovei: Object to that.
The Court: Overruled.
Mr. Solovei: Exception.

A. He was carrying a package in his arm, wrapped up in brown paper.

728

Q. Can you illustrate with your hands the size of the package? A. The package was about that size (showing).

Mr. McGough: Indicating what? Ten inches square? For the record, indicating about ten or twelve inches.

Mr. Geoghan: Looks about that to me.

Mr. Solovei: Object to that and move to strike the answer out.

The Court: Overruled. Motion denied.

Mr. Solovei: Exception.

729

Mr. McGough: You may inquire.

Mr. Solovei: Now, will your Honor direct the warden of the 161st Street Jail —I have subpoenaed records from there —ask him to turn them over to me so that I can cross-examine this witness.

The Court: Let me see these records, please.

(Records handed to the Court).

The Court: Is the Corporation Counsel here? Is he represented? Have you notified the Corporation Counsel of the

fact that this subpoena was served upon you?

The Warden: I was ordered here by Captain Walsh to report to this court.

The Court: Have you notified the Corporation Counsel?

The Warden: I have not, sir.

(The papers were handed to the Court).

The Court: Will Mr. Solovei and the District Attorney please approach the bench?

(There was a conference at the bench participated in by the Court, Mr. McGough, Mr. Solovei and it was later joined by Mr. Geoghan and Mr. Carabba).

The Court: The Court will now hand counsel for the defendant Malinski the records produced here by the Department of Corrections, concerning the witness David Yellin, including an order of the Supreme Court, signed by Mr. Justice Hooley, giving Mr. Solovei the right to interview this witness. You may have that order if you want it. It is a part of the record.

Mr. Solovei: I have a copy of it.

The Court: I will give you the original of it.

Mr. S[redacted]vei: I have a copy. Your Honor, s[redacted] that we will save time, I will proceed on another theory of examination of this witness at this time, and then I will read that which you have just handed over to me, so that I can come

back to this witness and we will save time that way.

The Court: No; you will please finish your cross-examination. And when I say "finish" I mean exactly what the word implies, unless there is some reason for you to ask some more questions. Bear in mind there are three lawyers here and there must be some consideration for the economy of time, without unduly restricting the rights of the defendants. 734

Mr. Solovei: Of course, your Honor realizes you gave me a batch of papers here.

The Court: Proceed. All you have there are just two sheets. The rest are just formal, stereotyped orders or documents; so it will just take you about a minute to go through this whole business.

Cross-examination by Mr. Solovei:

Q. Yellin, your first conviction was it in August, 1937? A. October, 1937. 735

Q. Was that where you were charged with rape and took a plea to assault in the third degree? A. That is right.

The Court: Was that rape in the second degree, Mr. Solovei?

Mr. Solovei: I haven't got the record here.

By the Court:

Q. Was that rape in the second degree; that

736 *David Yellin—For People—Cross*

is, having intercourse with a girl, with her consent, under the age of eighteen years? A. Yes, sir.

The Court: Go ahead.

By Mr. Solovei:

Q. And you were placed on probation at that time, is that correct? A. That is right.

737 Q. Later on, your probation was revoked, and you were sent to the Penitentiary, is that correct? A. Yes.

Q. Now, did you in January, 1938, commit the crime of compulsory prostitution in the County of the Bronx? A. No, sir.

Q. This other conviction of robbery was in New York County, in the Court of General Sessions, is that correct? A. That is correct.

Q. Do you know when that was? A. The conviction or the robbery?

Q. When was the crime committed? A. The crime was committed on the 10th of May.

738 Q. When were you convicted? A. I was convicted in December.

Q. You stood trial in that case, didn't you? A. That is right.

Q. Spielfogel was your co-defendant, is that correct? A. That is correct.

Q. What year was that conviction? A. 1941.

Q. The crime was committed on the 10th day of May, 1941, is that correct? A. That is correct.

Q. At that time you held up a man by the name of Sam Sackowitz, and took from him $20 at the point of a revolver, is that right?

Mr. McGough: I object to going into the facts.

The Court: Sustained.

Mr. Solovei: I except.

The Court: Are you familiar with the Kress case? People against Kress?

Mr. Solovei: Yes; I read about it.

The Court: Sustained.

By Mr. Solovei:

740

Q. You have committed more than one crime that night, didn't you? A. No, sir.

Q. More than one holdup, didn't you? A. No, sir.

Q. You held up more than one person, didn't you? A. There was more than one person in the place; yes.

Q. You were examined by a psychiatrist in 1941, in the Fall of 1941? A. Yes; before I was sentenced.

Q. And you spoke to the psychiatrist that examined you, didn't you? A. That is right.

741

Q. Do you know the doctor you spoke to? A. I don't recall his name.

Q. Would you remember his name, if I told it to you? A. I might.

Q. Dr. Cassidy? A. It does not strike.

Q. You lied to the doctor when you spoke to him, didn't you, Yellin?

Mr. McGough: I object to that.

The Court: Sustained.

Mr. Solovei: Exception.

By Mr. Solovei:

Q. Were you ever in Sullivan County? A. Yes.

Q. Were you there in July of 1936? A. Yes, I was.

Q. Was Spielfogel with you then? A. No, sir.

Q. At the present time, Yellin, you are now serving a Sing Sing sentence of from ten to twenty years, having been sentenced for the crime of robbery in New York County, is that correct? A. That is correct.

Q. And when was it for the first time, that you ever told any law enforcement agency the conversation or the statements that you related on the witness stand? A. The first time was the late part of October, 1942.

Q. October, 1942, is that correct? A. Yes.

Q. This was while you were at Sing Sing? A. No.

Q. Where were you? A. I was brought to New York.

Q. Prior to your coming to New York, did you talk to anybody at Sing Sing about it? A. No, sir.

Q. When you were brought to New York where were you brought to? A. I was brought to the Bossert Hotel.

Q. How long did you stay at the Bossert Hotel? A. For several hours.

Q. Did you sleep there over night? A. No, sir.

Q. After you left the Bossert Hotel where were you taken to? A. I was taken to a precinct station in Bath Beach.

Q. How long did you stay there? A. I was there for several hours, too.

Q. Did you sleep in Brooklyn that night? A. No, sir.

Q. Where were you taken that night to sleep? A. I slept at 121st Street Detention Prison.

Q. 121st Street or 161st Street. A. 121st Street.

Q. And Third Avenue? A. I don't know just what avenue it is on; 121st Street.

Q. Is that the place you are presently incarcerated? A. No. 746

Q. How long did you remain at the 121st Street jail? A. About a week.

Q. Now, when you were at the Bossert Hotel, whom did you talk to? A. Well, I spoke—there were detectives there, I spoke general conversation.

Q. Who brought you down from Sing Sing? A. Two detectives.

Q. Do you know their names? A. Yes; James Bell, Detective James Bell and Detective George Lowe.

Q. Bell and Lowe, is that correct? A. That is correct. 747

Q. Did you talk to Bell and Lowe while riding down from Sing Sing, about this case? A. No, sir.

Q. Did they ask you anything about the case? A. No, sir.

Q. And when you were taken off the train, did you go directly to the Hotel Bossert? A. It was not by train.

Q. Come down by automobile? A. Yes.

748 *David Yellin—For People—Cross*

Q. On your way down did you stop to have something to eat? A. No, sir.

Q. Did you drink? A. No, sir.

Q. At the Hotel Bossert, whom did you meet there? A. At the Hotel Bossert, there was Lieutenant James McNally, Detective John McNally, George Lowe, James Bell, District Attorney Heffernan, and one or two others whose names I don't know.

Q. Then you had a conversation with Heffer-
749 nan, is that right, the Assistant District Attorney? A. Yes; I had a conversation with him?

Q. Before you spoke to Heffernan, did you talk the matter over with Lieutenant McNally and Detective McNally? A. No, sir.

Q. No? Said nothing to them, and they said nothing to you about the case? A. I did not speak to them about the case.

Q. So that the first one that you ever spoke to about this case, at all, was Assistant District Attorney Heffernan, when you were brought down from Sing Sing by Detective Bell and Detective Lowe, the latter part of October, 1942,
750 is that correct? A. That is right.

Q. Did you make a statement in writing? A. Not at the hotel.

Q. What? A. I did not make any statement at the hotel.

Q. Well, how long did you remain at the hotel, while Assistant District Attorney was examining you or talking to you about this case? A. I was at the hotel there for several hours.

Q. And while he was talking to you about this case was there a stenographer that took down

your statement? A. I was not speaking to him about the case there.

Q. Well, you met Assistant District Attorney Heffernan at the Hotel Bossert, didn't you? A. That is right.

Q. You did not talk to him about the case? A. No; I did not want to talk to him about the case.

Q. You did not want to talk to him about the case? A. No.

Q. Did not talk to Lieutenant McNally or any of the other detectives about the case either, is 752
that correct? A. Not at that time.

Q. And Assistant District Attorney Heffernan asked you questions for about two or three hours, would you say? A. He did not ask me any questions pertaining to the case, he did not ask me any questions.

Q. Assistant District Attorney Heffernan, at the Hotel Bossert, did not ask you any questions at all pertaining to this case; is that right? A. No; that is not right. He asked me some questions but when I did not answer him he did not ask me any more at that time. 753

Q. That kept on for how long? For about two or three hours? A. For some time. I don't recall just how long.

Q. Was there a stenographer there? A. No.

Q. Did anybody take down any notations of your statement? A. No.

Q. Well, did you go from the Hotel Bossert to the District Attorney's office that day? A. No, sir.

Q. Can you give us the exact day in October that you were at the Bossert? A. I think it was—I am pretty sure it was on the 26th of October.

754 *David Yellin—For People—Cross*

Q. 1942; right? A. That is right.

Q. Do you know what time of day you got there? A. About six o'clock in the evening.

Q. Do you know what time you left Sing Sing Prison with the automobile, with Detective Lowe and Bell on the 26th of October, 1942? A. It was a little after four.

Q. Now, did Assistant District Attorney Heffernan leave the Hotel Bossert on this day in question, and you remain there with the detec-
755 tives? A. There were detectives, coming and going; I don't know who remained and who left.

Q. I am not asking you any particular detectives. I mean you remained with some police officers? A. Yes.

Q. How long after Assistant District Attorney Heffernan left did you stay at the Hotel Bossert with the detectives? A. I don't know that District Attorney Heffernan left.

Q. Was he there all the time while you were there? A. He was there and there were many others there. I did not notice whether he had
756 left. I did not know him. I did not take any more particular note of him than of anybody else.

Q. When he came into the room he introduced himself to you and said, "I am Assistant District Attorney Heffernan", did he not? A. No; he was introduced to me by Lieutenant McNally.

Q. Then you knew he was an assistant district attorney, is that correct? A. Yes.

Q. Did you all stay in one room? A. Yes.

Q. One large room? A. There were two rooms, but we all stayed in the living room.

Q. Was there a table there? A. Yes; there was.

Q. Were you seated at a table with Assistant District Attorney Heffernan? A. No; I was sitting on a couch.

Q. Was he sitting on a couch with you? A. Yes; he was sitting on a couch.

Q. And while on this couch, as you described, you both sitting there, was it then that he asked you these questions or some questions about this case? A. Yes; about that time.

Q. How long would you say that Assistant District Attorney Heffernan was actually asking you 758
questions before he left? A. I don't know how long it was.

Q. Would you say it was more than an hour? A. I mean I cannot say at all. I don't know just how long he asked me questions or whether it was for two minutes or for ten minutes or how the questions ran.

Q. You paid no attention to the time? A. Not particularly.

Q. Was Assistant District Attorney Heffernan actually in the room when you arrived or did he come after you came? A. I would not say for 759
certain.

Q. Do you know whether or not Lieutenant McNally and Detective McNally and some of the other detectives were actually in the room at the Hotel Bossert when you arrived from Sing Sing with Detectives Bell and Lowe? A. Were they at the Hotel Bossert with me?

Q. No; were they there when you arrived? Were they in this room when you got there? A. Yes.

760 *David Yellin—For People—Cross*

Q. So that it was shortly after your arrival that Assistant District Attorney Heffernan came into the room? A. I don't recall whether he was there or he came in.

The Court: Is this at all important, Mr. Solovei?

Mr. Solovei: Yes; it is important.

The Court: If it is, I am not going to restrict you.

761 Mr. Solovei: I think it is very important.

The Court: Proceed.

By Mr. Solovei:

Q. Did you ever sit at a table on that particular day, on the 26th of October, 1942, at the Hotel Bossert, and talk to somebody about this case who made some notes or there was a stenographer present? A. No, sir.

Q. Can you tell us what time that evening you left the Bossert? A. It was late that evening; I
762 don't know exactly.

Q. After 12 o'clock? A. I did not have a watch with me.

Q. Would you say it was after 12, the best of your recollection? A. I don't know whether it was after 12 or before 12.

Q. Did you have your dinner at the Hotel Bossert? A. Yes.

Q. With the detectives? A. Yes.

Q. Now, can you tell us when it was for the first time that you actually told anybody at all about

this case? What day was it? A. It was the same day I came down.

Q. Was it while you were at the Hotel Bossert? A. No.

Q. Was it while you were at some police station? A. Yes.

Q. What police station? A. Bath Beach.

Q. Would you say that was in the late hours of the night or early hours of the morning that you made such statement to somebody? A. It was in the very early hours. 764

Q. In the morning? A. Yes.

Q. Who was it you made that statement to? A. District Attorney Heffernan.

Q. In other words, District Attorney Heffernan again came down to see you at the Bath Beach police station in the early hours of the morning, and you made some statement to him; is that correct? A. Yes.

Q. Was there a stenographer present? A. Yes.

Q. You saw the stenographer take down what you said? A. Yes. 765

Q. He asked you a lot of questions, and you made a lot of answers, is that correct? A. That is correct.

Mr. Solovei: I now demand a copy of the stenographic record, please.

Mr. McGough: May I have the record note that I am gladly turning over this statement to counsel, five pages.

The Court: First, please, turn it over to the Court.

Mr. McGough: I think that is the better procedure.

The Court: That is the procedure laid down in the Walsh case.

Mr. McGough: I know the rule, but I don't want it to appear that I have any objection at all. In fact, I will offer it, if there is no objection, in evidence.

The Court: No, no; never mind that. Strike that remark from the record. Mark this for identification, please.

(Marked People's Exhibit C for identification.)

The Court: The Court will turn over to Mr. Solovei a manuscript which runs from page 8 to page 14 inclusive, which purports to be a statement made by this witness to Assistant District Attorney Heffernan, at 1:50 a.m., October 27, 1942. (Handing).

By Mr. Solovei:

Q. This statement was taken, according to the People's Exhibit C for identification, just handed me by the Court, at 1:50 a.m., on October 27, 1942; is that correct? A. That is correct.

Q. And there were a number of detectives present at the time? A. Yes, sir.

Q. Were you taken to a room, a detective's room over at this precinct and made this statement? A. Yes, it was a detective's—

Q. After this statement was made by you on October 27, 1942, were you further examined by

Assistant District Attorney Heffernan or any of the police officers? A. No, sir. 769

Q. And if I understood you correctly, after you made this statement on October 27th, 1942, you made no further statement to anybody in reference to this case; is that correct? A. Oh, yes, I did—I didn't get your question clearly.

Q. You made other statements? A. Yes.

Q. Now, when was it after October 27th, 1942, that you made another statement, and to whom? A. Well, there were several—a few—a couple of occasions I made statements to Mr. McGough. 770

By the Court:

Q. Was this statement made, this first statement made on the very night when you were brought down from Sing Sing? A. Yes.

Q. Same day? A. Yes.

By Mr. Solovei:

Q. Did you make any other statement to Assistant District Attorney Heffernan other than this one that I have here of October 27th, 1942? A. No, sir. 771

Q. Did you make any other statement to the detectives in writing, or did they take your statement down, other than this statement that I have here of October 27th, 1942? A. No, sir.

Q. So that the other statements that you now say were made were made to Assistant District Attorney McGough, is that correct? A. Yes; that is correct.

Q. How soon after the statement that you

made on October 27, 1942, did you make your statement to Mr. McGough? A. About four or five months.

Q. Four or five months after October? A. Yes.

Q. Would you say it would be about February of 1943? A. About.

Q. How many statements did you make to Mr. McGough, if you know? A. We just talked about the case.

773 Q. He asked you questions and you made answers? A. Yes.

Q. Was there a stenographer there? A. No, sir.

Q. Nobody took down your answers? A. No, sir.

Q. Was Spielfogel brought down with you in October of 1942? A. No; he was not brought down with me.

Q. Spielfogel was up in Sing Sing, with you, wasn't he? A. Yes.

Q. Was it later on that Spielfogel was brought down, if you know? A. No, Spielfogel had al-

774 ready—Spielfogel was—

Q. Was it later on? A. No.

Q. Was Spielfogel brought down before you were brought down? A. Yes.

Mr. Solovei: In view of your Honor's ruling that you want me to conclude, may I have a minute?

The Court: You mean you want to read the statement?

Mr. Solovei: Just glance through it fast.

The Court: No. Take your time and read it all. You have a right to read every sentence of it. You may sit down, Mr. Solovei and relax and take your time and read every word of it, if you choose.

(Mr. Solovei sits down and reads the statement.)

By Mr. Solovei:

Q. Mr. Yellin, when you made this statement to the District Attorney, on October 27th, 1942, you told him everything you knew about this case, didn't you? A. No. 776

Q. You withheld something, did you? Yes or no? Did you withhold anything? A. Yes.

Q. Have you told everything you know about the case here as you testified to here? A. Yes; so far.

Q. You mean you still withhold some testimony from the District Attorney here at this trial? A. No, sir.

The Court: Are you finished with the statement? 777

Mr. Solovei: At the present time; yes.

The Court: All right. Return it to the District Attorney.

Mr. Carabba: May we look at it, Judge, with your permission?

The Court: Yes, indeed. I beg your pardon, Mr. Carabba and Mr. Geoghan. Any counsel may have access to it.

(Statement handed to Mr. Geoghan who hands it to Mr. Carabba.)

778 By Mr. Solovei:

Q. Do you know how many visits you made to the District Attorney's office? A. No; I don't.

Q. Did you make more than ten? A. Yes.

Q. According to the records that were turned over to me here and my associates looked at, they tell me you made about sixty visits. Would you say that is true? A. I would not know exactly how many.

779 Q. What? A. I would not know how many visits I made to the District Attorney's office.

Q. Do you remember the first time you went to the District Attorney's office? A. No.

Q. Was it shortly after you made the statement of October 27, 1942? A. It was a little while after.

Q. You never went back to Sing Sing after that, did you? A. No.

Q. You were kept right here in New York? A. Yes.

Q. You were kept at the 161st Street jail on Third Avenue? A. Yes; I was at the 121st

780 Street jail.

Q. A short time? A. Then, the 161st Street jail.

The Court: Will counsel step up to the bench, please, one from each camp.

(Conference at the bench participated in by the Court, Mr. Geoghan, Mr. Carabba, Mr. McGough and Mr. Solovei.)

By Mr. Solovei:

Q. On November 2, 1942, you were at the

Fifth District Prison, is that correct? A. November what?

Q. November 2nd, 1942? A. I think I was still at the Fifth District then.

Q. On November 4th, 1942, you were taken from the prison about 3:45 p.m. and returned about 11:30 p.m. Do you remember that day? A. What prison, was that?

Q. It does not say here from what prison—I assume—on November 4, 1942 what prison were you in? A. I think I was in the Eighth 782
District.

Q. The Eighth District where you are now? A. Yes.

Q. You were taken from there at 3:45 p.m. and returned 11:40 p.m., where were you? A. I was being questioned by police.

Q. Where did they take you? A. They took me to the Hotel Bossert.

Q. How long did you remain there? All the time? A. Yes.

Q. You had your dinner at the Hotel Bossert? A. Yes.

Q. Did you sleep at the Hotel Bossert? A. 783
No, sir; you just said that I was returned at 11:30.

Q. On November 5th, 1942, you were again taken from the prison, and you were not returned. Where were you taken to? A. I was being questioned by the police.

Q. Where were you on November 5th, 1942 being questioned by the police? A. You say we were not returned at all that day?

Q. Do you know whether you were returned? A. You are telling me.

Q. I am now asking you were you returned? A. I was returned the next morning, the following morning.

Q. When were you returned the following morning, do you know? A. About 6 o'clock in the morning.

Q. Were you at the Hotel Bossert again? A. No, sir.

Q. Where were you then? A. Monticello, New York.

785 Q. They took you up to Monticello, N. Y.? A. Yes.

Q. You had some case pending up in Monticello, N. Y., did you not? A. No, sir.

Q. Did you have some matter pending up in Sullivan County? A. No, sir.

Q. How did you go to Monticello, N. Y.? By automobile? A. Yes.

Q. On November 6th, 1942, you were again taken from the prison, and you did not return on that day, did you? A. I don't recall.

Q. Well, if the records here show that you did not return that day until the following
786 morning, on the 7th, would that refresh your memory? A. No; not that particular occasion.

Q. Where were you on that day, do you know? A. If I was out I was being questioned by the police.

Q. Were you at the Hotel Bossert? A. Likely.

Q. All of your visits and all of your questions by the police and by the District Attorney were held at the Hotel Bossert, weren't they? A. By the District Attorney and by the police?

Q. Yes. A. No; not all of them.

Q. How many times did you dine at the Hotel Bossert with the police, have your dinner, luncheS? A. Every time I went there.

Q. You say it was at least twenty-five or thirty times? A. I would not say.

Q. Did you ever go out from the Eighth District Prison where you are now incarcerated, with a detective or somebody else, to visit some members of your family? A. Yes.

Q. How many times did that happen? A. I visited my home twice. 788

Q. Twice? A. Yes.

Q. Did you visit any of your girl friends? A. No, sir.

Q. Is Martha Yellin, your mother? A. No, sir.

Q. Sister? A. No, sir.

Q. What relation is she? A. She is my girl.

Q. Did you visit her? A. No, sir.

Q. Is Anne Kamer related to you? A. Yes.

Q. What relation is she? A. My sister.

Q. Did you visit her at 971 East 180th Street? A. No.

Q. Is that where she lives? A. Yes. 789

Q. While you were being held at the 161st Street jail, where you are now at, you are permitted, aren't you, to have visitors every day there, is that correct? A. Except Sunday.

Q. As many visits as you want, is that correct? A. As many visitors as the District Attorney's office gives permission to come to see me.

Q. You have been given an unlimited amount of visits, isn't that correct? A. No.

Q. Well, there were times, weren't there,

when you had two and three visits a day there, isn't that so? A. I had two and three visitors at the same time, yes.

Q. Members of your family? A. Yes.

Q. Now, Yellin, you are trying to help yourself, aren't you? A. What do you mean by that?

Q. You have heard that expression before, haven't you? A. Make yourself clear.

Q. You are trying to help yourself because
791 you have got a ten to twenty year sentence, and you are trying to help yourself by lessening your sentence, aren't you? A. In what way can I do so? In what way can I lessen my sentence?

Q. You mean you don't know how you can help yourself? A. I have never been told anything about my sentence being lessened by anybody.

Q. Never been told that at all? A. No.

Q. Never heard that at all before by people testifying in criminal cases, have you? A. No, sir.

792 Q. You would not hesitate in committing perjury if you thought that your sentence would be reduced substantially, would you? A. What was that?

(Question read.)

A. I would not commit perjury for that.

Q. You would not commit perjury to help yourself? A. No.

Q. What? A. I would not commit perjary to help myself in a situation like this.

By the Court:

Q. What do you mean by that? A. Why, there are men's lives at stake here.

By Mr. Solovei:

Q. Do you remember talking to me? A. Yes.

Q. Do you remember when it was that I visited you? A. What date?

Q. Yes. A. No; I don't recall the date.

Q. Do you remember the month? A. It was 794
last month.

Q. Last month? A. Yes.

Q. You mean the month of May, is that right? A. Yes; about that.

Q. Do you remember my being with one of the other attorneys in this case who visited you? A. Yes; that fellow there (pointing).

Q. Mr. Meadow. Do you remember my telling you that I am the attorney for one Morris Malinski? You remember that? A. Yes.

Q. And you remember my asking you whether or not you would like to talk to me or I would 795
like to talk to you about this case? A. You told me you wanted to talk to me about the case; yes.

Q. Do you remember saying to me that "I know nothing about Malinski that would help him or hurt him"; do you remember that? A. No, sir.

Q. Don't remember saying that? A. No, sir.

The Court: The question, of course, assumes that he did say it and you are asking him whether he remembers that. That is

not the proper way to put the question. Ask him he made such a statement.

Q. I will ask you now, did you say to me that as far as you know that you know nothing at all about Malinski that would help him or hurt him? A. No, sir.

Q. You remember—

The Court: No— "Did you?"

797 Mr. McGough: I object to the form.

Mr. Solovei: I will reframe it.

By Mr. Solovei:

Q. Didn't you say to me that the District Attorney is your lawyer and you refused to further talk to me? A. Yes.

Q. Now, on the 15th, when you say you were playing poker in this club house you remember— A. It was not a club house; it was a candy store.

Q. Who was it you were playing poker with? A. There were several men there.

798 Q. Were they some of your friends who were there that you went out and did stickup jobs with?

Mr. McGough: I object to that.

The Court: Overruled.

A. No, sir.

Q. How soon after the 15th of September, or February, rather, was it that you met Malinski? A. After the 15th of February?

Q. Yes. A. I met him in the summer of 1940.

Q. I am talking about the 15th of February, 1941, how soon after that? A. Oh, how soon after? I saw him the next day.

Q. The next day you say was on a Sunday? A. That is right.

Q. Where was it you say you saw him? A. At the corner of 7th Street and Avenue D. He was with Spielfogel.

Q. Talking to Spielfogel? A. Yes.

Q. On the street? A. They were outside the candy store.

Q. How far away were you at the time? A. I walked over and said "hello" to them and went inside the candy store.

Q. Just said "hello" and went away, is that correct? A. Yes.

Mr. Solovey: That is all.

Cross-examination by Mr. Geoghan:

Q. Now, Yellin, how many days before February 15, 1941, was it that you met Indovino as you say? A. About three or four days.

Q. Would that be about February 11th or the 12th? A. It was either on a Tuesday or Wednesday; I don't know exactly that date.

Q. On Tuesday or Wednesday prior to February 15th? A. 15th.

Q. What time of day did you meet him? A. I would say it was between 5:30 and 6:00.

Q. You are sure it was a week day, whether it was Tuesday, Wednesday or any other? A. Yes.

Q. Where was it that you met him? A. He was

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standing in front of an auto rental store on First Avenue between A and First Avenue.

Q. At that time was he alone? A. He was with Beitler.

Q. How long before that time had you met Indovino? A. I met him right there.

Q. Was that the first time you ever met him? A. That is right.

Q. Never knew him before that date? A. No, sir.

803 Q. Then, I assume, it was Beitler that introduced you; is that true? A. That is right.

Q. Now, then, you say a conversation then ensued between you and Beitler and Indovino, at that time; is that right? A. That is right.

Q. Who was it that introduced the subject of the conversation? Who spoke first about it? A. Ebbie.

Q. That is Beitler? A. Yes.

Q. What did he say to you? A. He said "he got something good out in Coney Island. I want Slip to go on it with me." He told me he had

804 something good out in Coney Island and he wanted Slip to go on it, and then told Indovino to tell me about—give me the details of the thing so I could tell it to Spielfogel.

Q. How long before that day was it that you first met Beitler? A. That I first met Beitler? I know Beitler anywhere from twelve to fifteen years.

Q. He was an old friend of yours? A. I know him, yes, very well.

Q. Now, it was Beitler that made that statement, was it, about the good thing some place? A. Yes.

Q. Beitler. Did he tell you what place? A. Beitler told me it was in Coney Island, he was a good thing out in Coney Island.

Q. Is that all he said? A. Then he told Indovino to give me the details.

Q. He said what?

The Court: Speak louder.

A. He told Indovino to give me the details.

Q. That is, this Joe Indovino sitting here? A. 806
Fellow sitting there.

Q. At the end? A. Yes.

Q. Tell us what details he gave you? What did he say to you? A. He told us it is a good touch, says there will be about a grand there, and says it is the manager of a theater who takes the day's receipts to the bank a couple of blocks away and the couple of blocks they walk it is as dead as Kelsey's; and he says, "The cop will give up quick because he ain't looking to get killed, and" he says, "it will be an easy touch."

Q. You are sure he told you it was the manager 807
of a theater? You are sure of that? A. Yes.

Q. As a matter of fact when you made the statement first to the District Attorney did you tell him that Indovino said it was the manager of a theater? A. Yes.

Q. Is that the first thing you told him? A. No; I told him—I did not tell him everything then.

Q. I did not ask you that. I say, when the District Attorney asked you questions with respect to this case, on October 25th or thereabouts, did you tell him that Indovino said that the soft

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touch or whatever it was could be made from the manager of a theater? A. No.

Q. What did you tell him? A. I told him I did not know.

Q. Didn't you tell him it was a payroll? A. Yes.

Q. In other words, that Indovino told you that the soft touch in Coney Island was a payroll? A. No, sir; Indovino told me that the touch was the day's receipts.

809 Q. Talk up. A. Indovino told me it was a day's receipts from a theater.

Q. When the District Attorney asked you what Indovino said, didn't you say Indovino said it was a payroll, and repeat that three or four times? A. Yes; I did say that.

Q. Now you tell us that you said that Indovino told you it was the manager from a theater in Coney Island? A. Yes.

Q. You learned that later, didn't you? A. I knew it at that time. Payroll in my language is the same thing. It is money.

810 Q. A payroll is the same thing as taking the proceeds— A. The day's receipts—it is the money that is carried.

Q. You say that in your opinion, because you look upon robbing a payroll as just the same as receipts obtained in a theater, which a manager is about to deposit; is that right? Is that your explanation? A. Yes.

Q. All right. That is enough for me. You read about this case, didn't you, after it happened? I mean about the robbery and the murder? A. Yes; next day.

Q. The statements that you read in the news-

papers contained the accounts about the shooting of Patrolman Fox; isn't that right? A. Yes; I read about the cop being killed out there.

Q. You have been discussing it? A. What?

Q. You have been discussing it since you came down here from Sing Sing prison, with the detectives and the Assistant District Attorney, haven't you? A. No, sir; I spoke to the District Attorney about it.

Q. And the detectives also; isn't that so? A. Yes. 812

Q. And during the course of those conversations that you had with the District Attorney, or Mr. McGough, or Mr. Heffernan, and the detectives; of course it was frequently mentioned that the robbery was in connection with the proceeds of a—I mean to say, the receipts taken in at a theater down there; that has been discussed frequently? A. I told them, yes.

Q. You told them? A. Yes.

Q. At the time that you first met Indovino, which you place at some two or three days before February 15, 1941, were you employed? A. Yes. 813

Q. Where were you working? A. I was working at the Allied Gymnasium Equipment Company, 80 York Street, Brooklyn.

Q. What time did you finish work on that day? A. We quit work at 4:30.

Q. Can you remember on that particular day you quit at that time? A. Yes.

Q. Where did you go from ther? A. Washed up, got dressed, and then I took the subway.

Q. What subway did you take? A. 8th Avenue subway.

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Q. And where did you get off? A. Got off at Houston Street.

Q. What time was that about? A. About 5:30.

Q. How far from the subway station do you live, I mean this Houston Street? A. From Houston Street, let us see, it is about, say, it is about eleven blocks.

Q. Is that your regular station to get off or did you just happen to get off at that station that day? A. No; that is my regular station.

815 That is the way I went to work and came from work.

Q. That is the nearest subway to your house? A. That gets me closest to 80 York Street.

Q. You say it is about eleven blocks away? A. Yes.

Q. Now, when you got off at the Houston Street station on that day, that is this date in February, 1941, was it your intention to proceed immediately to your home? Was that your intention at that time? A. Yes.

Q. You just happened to see Indovino and Beit-

816 ler? A. I walked past, yes; I walked down First Street.

Q. I mean, you just happened to see them there? A. Ebbie saw me and called me over.

Q. They called you over? A. Yes; Ebbie.

Q. Ebbie? That is Beitler? A. Beitler, yes.

Q. You went over? A. Yes.

Q. That is when you had this conversation? A. That is right.

Q. That is the last time you ever saw Indovino, isn't it? A. No; I saw him afterwards.

Q. When? A. I saw him on 7th Street and

Avenue D, in the company of another fellow whom I don't know.

Q. When was that? A. This was a couple of weeks after.

Q. Couple of weeks afterward? A. Yes.

Q. That would be some time in February or the early part of March? A. Early part of March.

Q. Avenue D in New York? A. Yes; 7th Street.

Q. Was it on Sunday or a week day? A. I think it was on Saturday night. 818

Q. Was he alone at the time? A. He was with another fellow.

Q. Do you know who that was? A. No, sir.

Q. Did you meet him on the street or in some— A. I saw him passing by; I did not speak to him.

Q. Just walking along the street? A. Yes.

Q. What time of the night was it? A. Early part of the evening.

Q. About what time? A. I don't know what time it was.

Q. Well, when you say the evening, do you mean before six o'clock or after six o'clock? 819
A. I don't know what time it was.

Q. Haven't you some idea? You saw him? A. Yes; I saw him.

Q. Was it light or was it dark? A. Dark.

Q. Isn't it true, as a matter of fact, that you never saw Indovino in your life until you were brought into the Bossert Hotel here, after his arrest on October 24, 1942? A. No, sir.

Q. That is not the truth? A. No, sir.

Q. In the month of February, 1941, and particularly on the day you say you first met In-

dovino, what kind of work were you doing? A. I was employed as a machinist's helper.

Q. How long had you been employed as a machinist's helper prior to that date? A. Approximately six months.

Q. What was the name of your employer? A. Mr. Gartner.

Q. What was the exact address? A. 80 York Street.

Q. Just to clear up a matter, when you said
821 you were working at 80 York Street for Gartner for about six months, you refer to the early part of 1941, and, I assume, the latter part of 1940; is that right? A. That is right.

Q. Now, you knew about this crime, as you say, from practically its very inception, didn't you? From its very beginning you knew about it? A. That is right.

Q. According to your testimony you knew there was something hatching about it before it was committed? A. Yes.

Q. That was in February of 1941? Correct?
822 A. What was that?

Q. When you first heard about it—when Indovino and Beitler spoke to you about it? A. Yes.

Q. How long after this patrolman was killed did you know about it? A. I knew it the same night.

Q. That, you say, you got from Rudish over in New York? A. Yes.

Q. And from that time until October of 1942 you never told any public official or any law enforcement agency anything about it? A. No, sir.

Q. And not until you were brought down here by two detectives sent up to Sing Sing prison; is that right? A. That is right.

Q. Then you readily told everything you knew? A. No, sir.

Q. You told them that same day? A. I told it to them—yes—I did—I told it.

Mr. Geoghan: That is all I have for this witness.

The Court: Any additional cross-examination? 824

Mr. Geoghan: Pardon me. Just a question or two. I don't want to repeat all Mr. Solovei has gone over. That is why I have just confined myself to these questions.

Q. But I would like to ask you a couple of questions now along the line suggested by Mr. Solovei. No promise has been made to you by the District Attorney, of course? A. No, sir.

Q. For anything you might testify to here? A. No. 825

Q. He has not even intimated that he might say a good word in your behalf? A. No, sir.

Q. You don't expect any help at all for what you are doing, do you? A. No, sir.

Q. You say you would not hesitate to commit —or you say you would not commit perjury even if you thought it might help you and reduce the time you are now serving in prison—you would not do that? A. No.

Q. You would commit a robbery but you would stop at perjury; is that right? A. Yes.

826 *David Yellin—For People—Cross*

By the Court:

Q. Wouldn't you testify falsely against a man on trial for his life if you could cut your sentence down? A. No, sir.

The Court: All right.

Cross-examination by Mr. Meadow:

827 Q. That trial in New York County wherein you were convicted of robbery, did you take the witness-stand there?

Mr. McGough: Object to that.
The Court: Sustained.

By Mr. Meadow:

Q. This girl friend of yours, by the name of Martha Yellin, is her true and correct last name Yellin? A. No, sir.

Q. In other words, she adopted your name, is
828 that correct? A. That is correct.

Q. When she visited you in the—did she visit you in the 8th District prison? A. Yes.

Q. When she visited you there were you ever alone with her? A. If there were no other visitors. We sat behind the screen, but always the officials of the prison are always on hand.

Q. Was she ever present—

Mr. McGough: I am going to object to this unless I know the materiality of it. It is incompetent, immaterial and irrelevant. It is not germane to the issues in

this case. It does not go to credibility in my opinion.

Mr. Meadow: I think it is very important to show whether or not he was being favored while incarcerated up in the 8th District prison.

Mr. McGough: Object to that. It is not important whether he was or not, I submit.

The Court: Yes; it may have some materiality. He stated that he had visitors, sometimes two and three a day, with the permission of the District Attorney, up in the prison. Is there anything more you can get along that line? 830

Mr. Meadow: Yes.

By Mr. Meadow:

Q. At any time when you left the 8th District prison, outside the prison, was Martha Yellin there? A. On the outside of the prison?

Q. Yes. A. I met her once when she was coming to visit me, and I saw her outside the prison. She went back home. 831

Q. Did you speak with her when you met her outside the prison? A. I spoke to her for a minute.

The Court: I am going to let you ask the question, Mr. Meadow, as to whether he testified in the case involving the robbery charge. I will let you ask that question.

Q. Did you testify in New York County in the

case wherein you were a defendant, for robbery in the first degree? A. No, sir.

Q. Did you ever see Martha Yellin at the Hotel Bossert or near the Hotel Bosert? A. No, sir.

Q. Did you introduce Rudish to Malinski at any time? A. Yes.

Q. Will you tell us when that was if you know? A. It was the early Fall of 1940.

Q. Could you tell us where that was if you
833 know? A. It was on the corner of 7th Street and Avenue D.

Q. You remember that incident pretty well, don't you? A. Well, because I hang out on that corner.

Q. Can you tell us who else was present when you introduced Rudish to Malinski, if you know? A. Spielfogel was there and there was a couple of other fellows there, too.

Q. You say that was in 1940, is that right? A. That is right.

Q. It was in the Fall? A. Yes.

Q. You remember what you were wearing?
834 That is to say, were you wearing a hat and coat, do you remember? A. No, sir.

Q. Will you say it was a cold day? A. I would not remember whether it was cold that day or not.

Q. You would not remember the clothing the other people were wearing there, would you? A. At that particular time, no.

Q. Now, you testified that when Rudish saw you on February 15, 1941, he was wearing a black lumberjack; is that correct? A. That is right.

Q. Was he wearing a hat? A. He was wearing a cap.

Q. Did he have an overcoat on? A. No, sir.

Q. Did he have a top coat on? A. No, sir.

Q. Do you remember whether or not he was wearing a tie? A. No, sir.

Q. Is it your answer you don't remember or he was not wearing a tie? A. I could not see whether he was wearing a tie; his lumberjacket was buttoned.

Q. Did you say he called you out of the candy 836
store to speak to you on that night? A. That is right.

Q. Do you know whether or not anyone else was present at that time that he told this to you? A. No, sir; there was no one else with us.

Q. Do you recall at this time whether or not anyone in the candy store saw him motion for you to come out of the candy store on that night? A. I don't know whether anyone else saw him. He called me and I came out.

Q. When you say he called you, did he motion for you to come out or did he call you by 837
name? A. He called me by name, I turned around, and he motioned for me to come out.

Q. Isn't it a fact that you introduced Malinski to Rudish in the Spring of 1941? A. No, sir.

Q. Do you remember where you introduced the defendant Malinski to Rudish? A. Yes; on the corner of 7th Street and Avenue D.

Q. Do you recall at this time who was present there other than Malinski, Rudish and yourself? A. There was Spielfogel was present there, too.

838 *David Yellin—For People—Cross*

Q. You said that this lumberjacket, is that accurate? A. That is right.

Q. Now, did it have two pockets up here (indicating)? A. Had two pockets here.

The Court: Indicating the lower part.

Q. Would you know offhand whether it was buttoned or open at the time you saw him? A. Pockets?

839 Q. No; the lumberjacket itself? A. The lumberjacket was zipped up.

Q. Do you recall at this time what you were wearing at that particular time? A. Yes.

Q. What? A. I was wearing a suit.

Q. No coat or hat? A. No, sir.

Q. You recall whether or not it was a warm evening, warm night or cold night? A. It was pretty cold. There was a couple of light flurries of snow that night.

Q. It was snowing and cold? A. Yes.

Q. You were wearing just a suit and Rudish was wearing just a lumberjacket and a pair of
840 pants on and hat on, is that right? A. He had a cap on.

Q. With a cap on, is that right? A. Yes.

Q. Now, you are definite, are you not, that Rudish told you that he had a couple—he had over two bills with him? A. Yes.

Q. You are sure about that? A. Yes.

Q. No question about that? That is the exact words? A. Yes. "I have two bills". He said, "I got over two bills for my end."

Q. At that time what else did he say with reference to giving you money? Do you re-

member the exact conversation? A. He took out the money and said to me, "Do you need any?" I said to him, "No." I said, "I am doing all right." I told him I did not need any.

Q. He did not owe you any money at this time, did he? A. No, sir.

By the Court:

Q. You say "over two bills" is an expression which means "over two hundred dollars"? A. Yes; a bill is a hundred dollars. 842

Mr. Morritt: May I object to the Court's question?

The Court: Overruled.

Mr. Morritt: Exception.

By Mr. Geoghan:

Q. Do you remember when you were down in the police station when you made the statement to Mr. Heffernan? A. Yes.

Q. Do you remember they showed you certain photographs? A. Yes. 843

Q. Did you at that time make a mistake in identifying one photograph as Beitler instead of Indovino, or vice versa? A. I did not get that.

Q. I say, do you recall, when a certain photograph was shown to you, you said it was Beitler, when it was Indovino? A. Yes; that is right.

Q. You made a mistake? A. Yes.

Q. It was corrected later? A. I took a look at the pictures and I said, "Oh, no, that is

844 *David Yellin—For People—Cross*

Beitler," because there is a similarity between them.

Q. You and Rudish were very close friends, were you? A. Yes, sir.

Q. Do you know of any particular reason why after this crime was committed in Coney Island that Rudish should come over to you and tell you all about it? Any special reason for that? A. He always—we always told each other those things—

845 Q. I want to hear this. Talk up loud.

The Court: Talk up loud, please. (To Mr. Geoghan) Do you want to press the question, Mr. Geoghan?

Mr. Geoghan: Oh, yes. I want to know why he says Rudish came over and told him about it.

Mr. Carabba: Object to that on behalf of Rudish.

The Court: Overruled.

Mr. Carabba: Exception.

846 Mr. Geoghan: I will withdraw the question as long as counsel objects. After all, I don't represent Rudish.

The Court: The question is withdrawn.

By Mr. Solovei:

Q. You remember when Spielfogel accused Malinski of having something to do with his wife? A. No, sir.

Q. Weren't you there one night when Spielfogel said to Malinski—

Mr. McGough: I object to it.

Q. (Continued)—"I have heard that you have had intimate relations with my wife"? A. No, sir.

Q. Don't know anything about that? A. No, sir.

Q. Remember meeting him at a barber shop in New York around Avenue D, Malinski, while you were with Spielfogel? A. No, sir.

Q. Sure about that? A. Yes. 848

Q. You remember you, Malinski and Spielfogel walking towards Spielfogel's house one day where Spielfogel said he wants to prove that Spielfogel had—that Malinski had nothing to do with his wife—he wants to talk to his wife about it and have the three of you, four of you present? A. No, sir.

Q. Isn't it a fact that you and Spielfogel had guns on you and you threatened to blow his brains out because you claimed and Spielfogel claimed he had something to do with his wife? A. No, sir.

Q. You say no such incident transpired? A. 849 No, sir.

Q. Did Spielfogel ever tell you about it? A. No, sir.

Q. You generally did carry a gun on your person, didn't you? A. No, sir.

Q. Didn't Spielfogel and you say, "It is too bad we did not knock Malinski off" because he was having relations with his wife while Spielfogel was away? A. I was away at the same time Spielfogel was.

Q. No, no; I mean before that? A. No, sir.

850 *David Yellin—For People—Redirect*

Q. Did Spielfogel tell you that while you and he were up in Sing Sing, that Malinski had some relations with his wife? A. No, sir.

Q. You know there was some talk about it? A. No, sir.

Q. Nothing at all? A. No, sir.

Mr. McGough: Will your Honor properly instruct the jury with respect to these questions, that they must draw no
851 inference from questions counsel ask that are answered in the negative—that it is no proof.

The Court: Of course, gentlemen, you understand that is so. That applies to both sides. It applies to the District Attorney as well as to defense counsel. When I speak of "lawyer" I mean both sides. A lawyer may stand up here and say to a witness (by way merely of an example), "Did you shoot Christopher Columbus?" The witness says, "No." That is no evidence that he did. These
852 lawyers have a right to ask these questions. The witness says, "No; it did not happen." If it is on a collateral matter that settles it. That is the law. We are not trying cases here on atmosphere, innuendoes, and things of that kind. All right.

Redirect examination by Mr. McGough:

Q. When you were taken down from Sing Sing by these two detectives, did you know you

were going to be brought to New York in connection with the Fox case? A. No, sir.

Q. Counsel has said that you have been at the District Attorney's office about 50 or 60 times. Have you spoken to me on each of those 60 times? A. No, sir.

Q. You and I have discussed this case a few times, is that right? A. Yes.

Q. Can you tell this Court and jury when you and I first sat down and spoke about this case? A. Only a couple of months ago. 854

Q. Was it on May 26th, if you remember? Did I make some notes? A. Yes.

Q. Remember my looking at the calendar? A. Yes.

Q. Was it about that time? A. It was in May, yes, late in May.

Q. Now, with respect to what happened at the 62nd Squad, at Bath Beach, you were shown some pictures, is that right? A. Yes.

Q. Mr. Geoghan asked you if you made a mistake with the picture of Indovino and the picture of Beitler. Do you remember that? A. Yes. 855

Q. At that time, were you being questioned by Mr. Heffernan? A. Yes.

Q. Were you asked this question—

Mr. Solovei: I object to it.
The Court: Overruled.

Q. "Q. Now, will you take it again and see if that is the man shown on the photograph?" Were you asked that question? A. Yes.

Q. Did you make this response—

Mr. Solovei: I object to that. May the record show that the District Attorney is reading from a paper marked for identification, a statement alleged to have been made by this witness on October 27th, 1942.

The Court: Proceed.

Mr. Solovei: Exception.

856 Q. Did you make this answer? "A. Oh, that
857 is Ebbie Beitler. I did not take a good look at it. He has got the same curly hair." A. Yes.

Q. Will you take a look now at Indovino and tell me whether there is any doubt in your mind whether he is the man that stopped you, on your way home from the York Equipment Co. on that night, several nights before the 15th of February, 1941? A. There is no doubt whatever.

Mr. Carabba: I object to the form of the question.

858 Q. Is there any doubt in your mind that he is the man you had the conversation with about something good down in Coney Island? A. No doubt at all.

By Mr. Solovei:

Q. You said to the District Attorney that you were in his office for the first time you spoke to Mr. McGough on May 26th, 1943?

Mr. McGough: I object to that. That is not what he said, I respectfully submit.

Mr. Solovei: I will ask this witness this question.

Q. When was the first time you spoke to Mr. McGough? A. About three or four months ago.

Q. Was it before May 26th, 1943? A. Yes.

Q. Would you say the first time was in April, 1943? A. The first time I spoke to Mr. McGough I don't know just exactly when I first spoke to him, but the first time I discussed the case with 860 him was on May 26th.

Q. On May 26th? A. Yes.

Q. You were in the District Attorney's office on May 28th, weren't you? A. I don't know, that time. As you say, I made 60 visits to the District Attorney's office, I don't remember all the dates.

Q. You don't know whether you were there on May 28th, 1943? A. I was there several times —once or twice a week.

Q. As a matter of fact, on May 28th, 1943, you were there from 10:35 a. m. to 9 p. m., 861 weren't you? A. Yes; it may have been.

Q. And you spoke to Mr. McGough then, didn't you? A. Yes.

Q. On June 1, 1943, you were there from 11:55 a. m. to 8:15 p. m., is that correct? A. Yes.

Q. You spoke to Mr. McGough then, didn't you? A. No, I often waited for him in the detectives room—he was busy and could not see me —I would wait there sometimes all day—we would go for sometime without seeing Mr. McGough.

862 Q. In any event, you did talk on that day? A. I talked to him.

Q. About this case? A. No, sir.

Q. About some other case? A. He told me he is busy, he will see me right away—words to that effect.

Q. Whenever you went to the District Attorney's office, you never went there for the purpose of talking to him about any other case than this Fox case now that you are talking now; is that
863 correct? A. That is right.

Q. On June 15th, 1943, you left the prison at 10:55 a. m., and did not return? A. When was that?

Q. On June 15th, you left the jail where you were and you did not return. Where were you kept?

The Court: June 15th? That is yesterday.

A. Yesterday?

864 Q. Yes. A. I returned.

Q. You returned to the City prison? A. Yes.

Q. Up at 161st Street? A. Certainly.

Mr. Solovei: I now offer in evidence this record, which was subpoenaed on subpoena duces tecum, which was handed over to me by the direction of the Court, produced by the Department of Corrections of the City of New York, showing this witness—

Mr. McGough: I object to what it shows.

865

The Court: I know what it shows. You don't have to say what it shows. What materiality has that got? Does that contradict anything he said?

Mr. Solovei: Well, I did not ask him every question and every detail.

The Court: Just answer that yes or no: Does that contradict anything he said.

Mr. Solovei: For the purpose—

The Court: Just answer my question.

866

Mr. Solovei: I am not offering it for contradiction.

The Court: Did I ask you to answer my question?

Mr. Solovei: I am not offering it for contradiction.

The Court: Do you contend that that statement contradicts anything that the witness testified to?

Mr. Solovei: I am not offering it for that purpose.

The Court: Objection sustained.

867

Mr. Solovei: Exception. I ask that it be marked for identification.

The Court: Mark it.

(Marked Defendants' Exhibit A for identification.)

The Court: Now, gentlemen, we will take a recess for luncheon. Please do not discuss the case among yourselves or with any other person, or permit any one to speak to you about this case, or discuss it in your presence. You must keep your

868 minds open. Please don't form or express any opinion or conclusion as to the guilt or innocence of the defendants on trial or either of them, or any of them, until the case is finally submitted to you by the Court, after a charge on the law. You may retire and return at 2:15 p. m.

After Recess. Trial Resumed.

869 Mr. Solovei: At this time I move to strike out the testimony of the witness Yellin, all his testimony that he is alleged to have testified to here, subsequent to the 15th day of February 1941, on behalf of the defendant of course Malinski.

The Court: Now let me see; all he has testified to here is that he saw Malinski on some street corner.

Mr. Solovei: That is right.

The Court: In company of some man
870 by the name of Spielfogel.

Mr. McGough: No, he saw him on Saturday, the 15th, with a package, which he described, about 8 o'clock, I believe, in the candy store at 8th Street.

Mr. Solovei: My application, your Honor, is addressed only subsequent to the 15th of February, at this time.

The Court: He said he saw him on Saturday with some package.

Mr. Solovei: That is the 15th.

The Court: That is the 16th.

Mr. Solovei: Sunday was the 16th.

The Court: He said he saw him on the 16th with a package under his arm?

Mr. McGough: Saturday, the 15th, Judge.

The Court: What time?

Mr. McGough: At about 8 p. m.

The Court: At 8 p.m.?

Mr. McGough: Yes. Now if there is anything in the record—

The Court: That may stand. The alleged crime is said to have occurred at around midnight.

872

Mr. McGough: At about the hour of 11 p. m.

The Court: That may stand.

Mr. Solovei: My application—

The Court: There has been no testimony as to what the facts were.

Mr. Solovei: That is the 15th you are talking about?

The Court: It might have been his wash; it might have been his laundry.

Mr. Solovei: That is the 15th?

The Court: Yes.

873

Mr. Solovei: I am talking about the 16th, on Sunday.

The Court: The testimony with reference to the 16th is that he saw him on some street corner in company with a man by the name of Spielfogel.

Mr. McGough: Yes, that was brought out on cross-examination.

The Court: On cross-examination?

Mr. McGough: I might be in error on that.

874 *Colloquy*

The Court: I think it was brought out on direct examination.

The Court: The testimony is of no consequence.

Mr. McGough: No.

The Court: And it has no bearing on the guilt or innocence, has it?

Mr. McGough: No, I think the witness answered that way when he misunderstood the question, but he did later on say that
875 it was on Saturday that he saw him with the package, at 8 o'clock.

The Court: That is prior to the time the crime was committed?

Mr. McGough: That is correct.

The Court: Of course nothing has been shown here as to what the package contained?

Mr. McGough: No.

The Court: It might have been his wash. It might have been his lunch, or anything. At this particular moment, as it stands now, it means nothing. It may
876 mean something later, but I don't know. That remains to be seen. I will let that testimony stand at the present time, Mr. Solovei. Your motion is denied.

Mr. Solovei: I accept.

Mr. Carabba: I make the same motion, if your Honor pleases, on behalf of the defendant Rudish, that any testimony he gave, the witness Yellin gave, after the commission of the crime, that occurred on February 15, 1941—

The Court: You mean as to his conversation with Rudish.

Mr. Carabba: Yes.

The Court: Your motion is denied.

Mr. Carabba: And I respectfully except.

The Court: The testimony will stand. Its credibility is for the jury. The testimony given by this witness Yellin as to the conversation he had with Rudish along about midnight or thereafter, on Saturday night, or early Sunday morning, that testimony will stand. 878

Mr. Carabba: Exception.

Mr. Geoghan: I have no motions because there were no conversations testified to as to Indovino.

The Court: You have your exception, Mr. Carabba.

Mr. Carabba: I want to keep the record clear.

The Court: Proceed.

879

LOUIS SONNENBLICK, residing at 722 Van Sicklen Avenue, Brooklyn, N. Y., called as a witness in behalf of the People, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. How long have you been living there, Mr. Sonnenblick? A. This address?

Q. Yes. A. A couple of weeks.

Q. Now before that, where did you live, please? A. Before that I lived at 752 Elton Street.

Q. 752 Elton Street, Brooklyn? A. Yes, sir.

Q. And how far is that from Pine Street and Fulton Street in this Borough? A. About a mile.

Q. Do you know a man named Nathan Spielfogel? A. Yes, sir.

Q. Are you related to him? A. I am an uncle of his.

Q. You are an uncle of his? A. Yes, sir.

Q. Now were you living at 752 Elton Street on February 15, 1941? A. Yes.

Q. Were you in business for yourself at that time? A. Yes.

Q. And what was the name of your firm? A. The Biltmore Metal Weather Strip Company.

Q. And were you the proprietor of that company? A. Yes.

Q. Did you ever see the defendant Jake Rudish, or Sidney Rudish, in your life? A. No, sir.

Mr. McGough: That is all.

Mr. Carabba: No questions.

Mr. Geoghan: No questions.

Nathan Spielfogel—For People—Direct 883

NATHAN SPIELFOGEL, residing now at Sing Sing State Prison, New York, called as a witness for the People, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Now Mr. Spielfogel, how old are you, please? A. I am 28 years old.

Q. And you told the Clerk that your address is Sing Sing Prison? A. That is right.

884

Q. When did you go to Sing Sing Prison? A. I think it was December 15, 1941.

Q. And was that in this County or from another County in this State? A. New York County.

Q. Was that on a charge of robbery in the first degree? A. Yes, sir.

Q. Was that a robbery conviction while armed or unarmed, if you know? A. I think it was armed; I am not sure.

Q. What was the sentence of the Court following your conviction in that case? Robbery in the first degree.

885

Q. What was the sentence of the Court on that case? A. 30 to 60.

Q. And you are serving that sentence of 30 to 60 years in Sing Sing Prison? A. Yes, sir.

Q. Is that as a second offender? A. Yes, sir.

Q. In 1937, in this County, were you convicted of the crime of attempted robbery in the first degree? A. Yes, sir.

Q. And did you serve a sentence in Elmira Reformatory? A. Yes, sir.

Q. How long a sentence did you serve in Elmira? A. I served about three years.

886 *Nathan Spielfogel—For People—Direct*

Q. Do you know the defendants on trial, the three men, Malinski, Rudish and Indovino? A. I do.

Q. How long have you known Morris Malinski? A. Oh, since about June 1940,—no, 1937.

Q. Roughly about six years, would you say? A. That is right.

Q. What nickname did you have for him? A. I call him "Moish".

Q. And how long do you know Sidney Rudish?
887 A. I must know him about 15 years.

Q. Under what name do you know him? A. Jake.

Q. And the third man, Indovino, how long do you know him? A. Since about May, 1937.

Q. About six years and one month? A. Something like that.

Q. Did he have any nickname? A. Yes, they called him Joe the Tiger.

Q. And now do you know of your own knowledge the night that Patrolman Leon Fox was shot in Coney Island? A. I do.

Q. What date was it, please? A. I think it was
888 February 15, 1941.

Q. Now do you recall Davie Yellin coming to you a few days prior to that particular day? A. I do.

Q. And do you recall having a talk with him? A. I did.

Q. Tell us, please, where that conversation took place. A. That conversation took place on 7th and D, in the candy store.

Q. Was Tiger's name mentioned in that conversation?

Mr. Geoghan: I object.
Mr. Morritt: I object.
The Court: Objection sustained.

Q. Tell us, please, whether anyone here in this court was mentioned during that conversation.

Mr. Geoghan: That is objected to.
The Court: Just "Yes" or "No".
The Witness: Yes. 890

Q. Now will you tell us, please, what Davie Yellin told you and what, if anything, you said to him?

Mr. Solovei: I object to it.
Mr. Geoghan: I object to it on behalf of the defendant Indovino, not in the presence of Indovino.
The Court: As far as the defendant Indovino is concerned, the objection is overruled. 891
Mr. Geoghan: Exception.
Mr. Solovei: I object to it on behalf of the defendant Malinski.
Mr. Carabba: I make the same objection.
The Court: Just a moment; sustained as to Malinski.
Mr. Carabba: I make the same objection on behalf of the defendant Rudish.
The Court: Sustained as to Rudish.

892 *Nathan Spielfogel—For People—Direct*

By Mr. McGough:

Q. May we have the conversation, please. A. What do you mean, what Yellin told me?

Q. Yes, what Yellin told you at that time and place. A. He called me on the side in the candy store and he says to me, "I was coming home from work tonight and I met Louie and Joe the Tiger," so I says, "What about it"? He said, "They want to talk to you about a piece
893 of work out in Coney Island", so I says, "Davie was telling me that the Tiger was laying it all out for him. He was outlining the robbery. It was supposed to be a Loew's out in Coney Island and he is supposed to be the tipster."

By the Court:

Q. Who is "he"? A. Indovino, the Tiger.

Mr. Geoghan: I object to that and move to strike it out.

894 Q. Is that what Yellin said to you? A. Yes.

The Court: Proceed.

Mr. Geoghan: May I make a further objection to the testimony at this time on the ground that this witness though he is not a co-conspirator and therefore an accomplice cannot testify to any conversation had between him and Yellin.

The Court: The objection is overruled.

Mr. Geoghan: Exception.

By Mr. McGough:

Q. Go ahead. A. He told me it was a rookie cop walking with a—with a paymaster from the Loew's. He says they walked about two blocks; it is a dead place out in the Island. It is dead out there. He says it is a soft take. He said, "Are you going out to see him," Yellin, "see him tonight. I says, "No, as long as the Tiger give it to him, it don't interest me", and that is all that was said there. 896

Q. Did you see Beitler a short time thereafter? A. Beitler? Yes.

Q. When did you see Beitler after that? A. The next day.

Q. And where did you meet him? A. At 7th and D. He called me up.

Q. He telephoned you, did you say? A. That is right.

Q. Did you have a talk with him? A. I did.

Q. After that, did you meet him? A. Yes, he says, "I will be down in a few minutes; stick around". 897

Mr. Geoghan: I object to anything Beitler said.

The Court: Objection overruled.

Mr. Geoghan: Exception.

Mr. Solovei: I object to it on behalf of the defendant Malinski.

The Court: Objection sustained.

Mr. Carabba: I make the same motion on behalf of the defendant Rudish.

The Court: Objection sustained.

898 *Nathan Spielfogel—For People—Direct*

By Mr. McGough:

Q. Did you see Beitler shortly after he telephoned you? A. I did.

Q. Did you have a talk with him? A. I did.

Q. Tell us, first, the location where you met him and had the talk. A. At 7th and Avenue D.

Q. 7th Street? A. Yes, sir, and Avenue D.

Q. Now tell us what he said to you and what, if anything, you said to him. A. The first thing
899 he says, "Did you see Dave".

Mr. Solovei: I presume your Honor makes the same ruling?

The Court: I have ruled already. The record is protected.

Mr. Solovei: This is a separate conversation.

The Court: The testimony is only received with regard to Indovino.

Mr. Geoghan: I presume my objection covers anything that he is going to say?

900 The Court: Yes, Mr. Geoghan.

By Mr. McGough:

Q. Give us the conversation between Beitler and yourself at that time. A. He says to me, "Did Davie give you the low-down what I told him last night?" I says, "He did". Then he started in, "Why didn't you come down to see me last night?" I said, "I was busy", see, because he used to hang out on Houston Street, so I didn't—I just didn't feel like it. I knew Tiger give it to him and I didn't have any heart in the

thing. I didn't want to go over there. Then he started to tell me all about this Coney Island thing. He said it is a soft take; it is like taking candy from a baby. He said, "What is the matter; the Tiger didn't give it to you. He gives it to me. You got nothing to worry about". I says, "I don't want no part of it", so then he says to me, "How is chances of using the pieces", so I told him—

Q. Wait a minute; before you come to that. During that conversation was anything said as 902
to why you did not want to go in addition to what you have already said? A. Yes, I told him I didn't like the tipster.

Q. Anything else? A. When I put a gun in my hand, I told him, "I ain't going to worry about the after effects". I says, "I don't want no part of it."

Q. Did either you or Beitler say anything further at that time? A. Yes.

Q. Tell us the rest of the conversation. A. He says, "Is it all right to use the pieces?" I says, "You will have to ask Moish about them. Those 903
ain't mine. Those are his."

Mr. Solovei: I object to all this testimony.

The Court: That is received only as against Indovino. The answer is stricken out as far as the defendant Malinski is concerned and as far as the defendant Rudish is concerned.

The Witness: I said he will have to see Malinski if he wants the pieces. I ain't

904 *Nathan Spielfogel—For People—Direct*

got the pieces. He said, "Where is Moish now?" I said, "The only place where I figure he would be is the store where he works."

Q. Where is that? A. 10th Street and First Avenue. So before he left, I told him, I said, "Listen Ebbie, don't have no hard feelings; maybe some other time, but this is one time count me out." So before he left me I says to him,
905 "Come on up", and we walked over to 8th Street and Avenue D. I called Davie out of the candy store.

By the Court:

Q. Davie who? A. Yellin. I said, "Let us have a drink together before you go", and we had a drink apiece and he left for Malinski's store.

By Mr. McGough:

906 Q. You had a drink with Beitler? A. Beitler and Yellin.

Q. Now on the night of February 15, 1941, did you see Moish Molinski? A. I did.

Q. What time did you see him? A. I seen him about 1:30 in the morning.

Q. Where did you see him? A. He come up my house.

Q. That would be the early morning hours of the 16th? A. That is right.

Q. Sunday morning? A. That is right.

Q. And where were you living? A. I was living at 92 Lewis Street, Manhattan.

Q. Was Malinski alone when he came to your house at that time? A. Yes.

Q. Were you awake when he came to the house? A. Yes, I was lying in bed but I was not asleep.

Q. Did you get up and speak to him? A. I did.

Q. Tell us, please, what Malinski said to you on that occasion. A. As soon as he stepped in 908 the house—

Mr. Morritt: I object to that on behalf of Rudish.

Mr. Geoghan: Same objection on behalf of Indovino.

The Court: What is the date of this?

Mr. McGough: This is the early morning of Sunday, the 16th of February, 1941.

The Court: Objection sustained. This is received only with reference to Malinski.

909

Mr. McGough: That is correct.

The Court: It is only offered for that purpose. Proceed.

The Witness: As soon as he stepped in the house, he told me, "We had a shooting match." He said, "I want to talk to you." I said, "Wait a minute, take it easy, Moish." My wife was there. I stepped into the hall with him. He said, "We had a shooting match. Get dressed. I got to talk to you"; so I went back in the

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house and got dressed and left with him and went down to the Citadel Club.

By the Court:

Q. Where? A. The Citadel Club.

By Mr. McGough:

Q. Where is the Citadel Club? A. On 4th Street and Avenue C.

911 Q. Did you notice how Malinski was dressed at that time? A. Yes, he had a suit on; a brown suit, I believe.

Q. Anything else? A. No.

Q. Did he have a hat? A. No.

Q. A coat? A. No.

Q. Did you have any talk with him about the hat at that time?

Mr. Solovei: I object to the District Attorney leading the witness.

The Court: Yes, objection sustained.

912 Q. Tell us, please, how he was dressed? A. He just had a suit on. His hair was all thrown apart like—he looked like a wild man from the wind blowing, and he did not have no coat.

Q. Did you have any talk about that? A. Yes, after I come downstairs.

Q. Where did that take place? A. Downstairs. I said, "What happened to your hat and coat?" He said, "I got a coat over in the club but the hat, it is Hershee's hat. I dropped it on the hoist after I jumped out of the car."

Q. Did you say it was Hershee's hat? A. Harry Levine's.

Q. Did Harry Levine have a nickname? A. We used to call him Hershee.

Q. That is the nickname of Hersh? A. That is right.

By the Court:

Q. What is a hoist? A. A hoist is a stick-up.

914

The Court: Go ahead.

By Mr. McGough:

Q. Did he say anything else when he said that he dropped Hershee's hat? A. He said—see, he did not say that then. I went back up the house again to get my hat. I gave him the green one.

Q. You gave who a hat that night? A. Malinski.

Q. That was a green hat? A. Yes, that is right. Then we started back over for the club when I come down.

915

Q. And that was the Citadel Club? A. That is right.

Q. Did you talk to Malinski on the way over to the Club? Yes. He says, "The cop went down—the donkey went down like a ton of bricks."

Q. Who said that? A. Malinski.

Q. Anything else? A. "It is a sure thing he will never make it. Valentine will pay off one of them brand new 'C' notes"—

Q. Who said that? A. —"by morning"—Malinski.

Q. What is a "C" note? A. A hundred-dollar bill.

Q. What did you say? A. I didn't say anything. I was just listening. I was a good listener.

Q. Did you arrive at the club? A. I did.

Q. And how long were you at the club with Malinski? A. Oh, I would say about three-quar-
917 ters of an hour; half an hour.

Q. Tell this Court and jury what was said at that time between the two of you. A. He started off—he says, "Here is what happened." He says, "I met Jake about 9 o'clock."

Mr. Morritt: I object to this.

The Court: Objection sustained. This testimony is received only as against Malinski, and the jury is instructed to disregard it as against any of the other defendants.

918

Q. Go ahead. A. He said, "I met Jake about 9 o'clock on 8th Street. From there we shot over to Ebbie's on Houston Street. That is where Beitler used to hang out," he says, "and from there we shot out right to the Island. On the way out, it was all made up for who is going—that is, to take the cop and who is going to take the pay-man. And when they got out there, they went to the Cosmo Restaurant right near Loew's, and they had a little snack, and then Ebbie stepped out of the place, out of the restaurant, and went by Loew's. He come back in a few

minutes and he told Jake, pull the car out near the bank. He said it is getting time and when I give you the signal, he will be on the corner, for Moish to get ready. That means the cop is coming down with the pay-man, and a short while later, the patrolman and the pay-man come down. They passed Ebbie Beitler and he give Moish the signal, and Moish stepped out of the car. He says as soon as he hollered 'this is a hoist' to the cop, so he says like the cop went for his 'piece'. It is 100 per cent. sure the cop 920 went for his piece, so I threw a few. I pegged a few."

Q. Who said that? A. Moish.

Q. He said he threw a few? A. That is right.

Q. Go ahead. A. And he is supposed to go for the money but he never did, and he just jumped right in the car, and Ebbie run for the money and he hollered to the pay-man, "Stay where you are or I will drop you", and he jumped in the car, and the door was broke, on one of the doors—

Q. Who told you the door was broke? A. Ma- 921 linski. He says so he wanted to go to the door, that he gets in fast enough, so he jumped in the front over the seat into the back and then Ebbie come jumping in, jumped in, and then they left, and he says, "That cop, that donkey had a lot of balls, he laid on his belly and was still pegging. He was still throwing pills, still pegging." He says, "We went about a couple of blocks", he said, "two and a half blocks and made a one turn and jumped out." He said, "Ebbie and I grabbed a cab and we shot back to New York." He said, "First we took one cab

and we went about twelve blocks." He said, "Then we jumped out and took another cab and come all the way down to the East Side."

Q. This conversation took place early Sunday morning at the Citadel Club? A. That is right.

Q. Will you continue the conversation, please? Was there anything said about what happened after they got to New York? A. Yes. He said they stopped right near the church on 4th Street and Ebbie instructed him to go up in the club
923 with the money and that he would go over to his aunt's store a few blocks away on Houston Street and drop the "pieces", and that he would be back soon and that would give Jake enough time to come back because he was supposed to come back by train.

Q. Anything else? A. Then Jake come back; Ebbie come back and they split up in the club.

Mr. Solovei: Do I understand this to be a continuous conversation between him and Malinski?

924 By the Court:

Q. Was this in your presence or what somebody told you? A. He told me.

Q. Malinski told you? A. Yes.

The Court: That testimony is stricken out as far as the defendant Rudish is concerned, it will stand as far as Malinski is concerned and it is received only as to him.

925

Mr. Geoghan: It is stricken out as far as Indovino is concerned, too?

The Court: Exactly.

By Mr. McGough:

Q. What you are telling us now is what Malinski told you on that morning? A. Yes.

Q. Was there anything more said? You mentioned something about a cut, did you? A. I did. They split it up in the club and Jake and Beitler was given that bum rats for not doing as he was told to do.

926

Q. Will you tell us what Malinski said about that? A. He said, "I done everything I was supposed to do." He said, "We made it up before that we take the cop and I took the cop. Ebbie was supposed to go for the money and he went for the money," and both of them, Rudish and Ebbie is saying that Malinski is supposed to go for the money.

Mr. Carabba: I object.

927

The Court: I have sustained your objection right along, and I have instructed the jury in no uncertain terms that the testimony here applies to Malinski, and not to either of the other defendants. Do you want additional instructions to make it more emphatic than that?

Mr. Carabba: No, your Honor. As long as your Honor has instructed the jury about that, that is sufficient.

The Court: I have underscored the words. I have emphasized them. I do

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so again, that this testimony is received only as against Malinski.

Q. Was there any more conversation, please? A. Yes.

Q. What was said after that, if anything? A. (No answer.)

Q. You told us that Malinski told you that Ebbie and Rudish were talking about who was doing what. A. Yes. He said Rudish was driv-
929 ing the car, and him and Ebbie, one of them was in the back, and Malinski was in the back, and Ebbie was sitting alongside of him.

Q. During any part of that conversation, was the subject of weapons discussed, and if so, please tell us what it was. A. Up in the club, I asked him, Malinski, "Which 'pieces' did you use?" In other words, what guns did you use on that hoist, and he said, "I used the 'pieces' that Red the tippler got out of the locker up town."

Q. "Red the Tippler" got out of the locker
930 up town? A. Out of the checking place where you check baggage.

Q. Do you know "Red the Tippler"? A. I do.

Q. What is his right name? A. I believe it is Eisler.

Q. Eisler? A. That is right.

Q. Was anything said as to the make of the guns? A. Yes.

Mr. Carabba: Of course that is leading.

Mr. McGough: I dislike to lead.

The Court: I know it is leading, but go ahead.

The Witness: He says, "We used two .38's side-throwers and two .45 automatics." He said he had the .38's and Ebbie had the .45's.

Q. At what time? A. On the hold-up.

Q. Do you recall any additional conversation with respect to those guns and Red the Tippler or after Red the Tippler— A. I spoke to Red. He told me himself—

932

The Court: No, no, strike that out.

Q. Don't tell us what anybody said. I am asking you about your conversation with Malinski. Was anything said in addition to what you told us about the guns with respect to Saturday the 15th of February? A. Oh, that he went— and put the "pieces" that were hot, to put them over in his aunt's store.

Q. Who did? A. Ebbie.

Q. Before that, was anything said with respect to those guns, where they were on the early afternoon of Saturday, the 15th, Saturday afternoon? A. Saturday afternoon?

933

Q. Or Saturday evening. A. Saturday afternoon, they were in the store.

Q. What was in the store? A. The pistols.

Q. Who told you that? A. I knew it myself because I put them in there.

Q. Who told you that? A. Malinski.

By the Court:

Q. Malinski told you that he put the guns in the store? A. I knew they were there.

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Q. What? A. Yes, I was there when he had it.

Q. You were there when he had the guns in the store? A. Yes.

Q. On Saturday the 15th? A. That is right.

Q. You mean, when Malinski had the guns? A. That is right.

Q. Malinski? A. Malinski.

Q. Is it Malinski or Dolinsky? A. Malinski.

Q. You mean the defendant Malinski? A. That is right.

935

The Court: Proceed.

By Mr. McGough:

Q. What time did Malinski go home that night, if you know? A. That night?

Q. That night of the conversation.

Mr. Solovei: The 15th, we are talking about.

The Witness: I guess it was about four in the morning.

936

Q. Where did you leave him? A. On Essex and Delancey Street, going down to the trolley car.

Q. Now did you see this defendant Rudish on Friday, the 15th of February, 1941? A. Friday?

Q. On Friday the 15th? I mean, Friday the 14th; excuse me. A. I did.

Q. That would be the 14th, would it not? A. Yes.

Q. Where did you see Rudish at that time? A. I seen him by the candy store on the 7th and D.

Q. Did you have a talk with him, Spielfogel? A. Yes, he says to me, "How come you are working? What is the matter with that thing? How come you ain't going on it," so I says to him, "I don't like it, Jake; that is all," That was all that was said.

Q. When was the next time that Friday that you saw Rudish? A. The next time I seen him was Saturday, Saturday afternoon.

Q. Can you tell us about what time and what place? A. I guess it was about 3 o'clock Saturday afternoon. 938

Q. Where? A. 7th and D.

Q. Were you alone? A. I was.

Q. Did you have a talk with him then? A. I did.

Q. Tell us, please, what he said to you and what you said to him. A. He says to me, "Hey Slip"—

Q. Is that your nickname, Slip? A. That is right. "How come you ain't going on that thing? It is supposed to be a good thing". I says, "I tell you the truth, Jake, I don't like the tipster." 939
That is all I said to him.

Q. Was anything said about any other person at that time, between Rudish and you, on Saturday afternoon? A. Yes, he says that Malinski, Ebbie and Beitler is going to step out on it tonight. He has got to meet them at 9 o'clock that night. He says to me, "I am going out to meet out in Brooklyn by your uncle's place and I want to get somebody a job and all I want is your okeh when I go there."

Q. What was your uncle's name? A. Louis Sonnenblick.

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Q. Where was he living then? A. 752 Elton Street, Brooklyn, he was living.

Q. And Rudish said he was going out to see him on that day? A. He said he was going out to see my uncle.

Q. Did he say why?

Mr. Solovei: That is all over my objection on behalf of the defendant Malinski.

The Court: Objection sustained.

941 Mr. Geoghan: Of course that also goes as to the defendant Indovino?

The Court: Objection sustained.

Mr. McGough: This is offered solely against Rudish, if your Honor pleases.

The Court: Yes, and the jury must so understand.

Q. You were telling us, Spielfogel—

The Court: I instruct the jury again that the evidence is only received as against Rudish in this instance.

942

Q. Now, Spielfogel, you said that Rudish and you were discussing your uncle Louis Sonnenblick of Elton Street? A. That is right.

Q. Did you give us all the conversation respecting your uncle? A. I told him and says, "All you go to do is tell my uncle, give him the guy's name, and when the parole officer comes out there, to say that he is getting $15 a week and that his people got him the job."

Q. That was Saturday? A. That was Saturday.

Q. When did you see Rudish the next time after that? A. The next time I seen him was Sunday.

Q. Would that be after Patrolman Fox was shot? A. That is right.

Q. Where did you see Rudish then? A. 7th and D, at the candy store; 7th and D.

Q. What time was it on Sunday? A. It must have been about maybe one in the afternoon; one o'clock in the afternoon.

Q. What was the first thing he said to you then? 944

Mr. Carabba: I object to that, after the shooting.

The Court: What Rudish said to him after the shooting?

Mr. Carabba: Yes.

The Court: Objection overruled.

Mr. Carabba: Exception.

The Court: The evidence is received only as against Rudish.

The Witness: I walked in the candy store and asked for an egg cream and he come bouncing over to me and he said, "Where were you last night?" I said, "Go ahead, Jake, have a drink", and we both had a drink. He said, "Come on, I want to talk to you." I said, "I want to talk to you, too." We went over to a place where they have all kinds of delicatessen food around on 7th and Lewis, and he starts saying, he says, "With Moish, one of these days, you are going to wind up in the sewer with him; what a dog cocksucker 945

he is". He said, "Last night everything was fixed to do it one way and he balled everything up. All he knows how to do is throw a couple of shots", and he says to me—I told him, "Listen, Jake, forget what happened. Nobody is going to know about it. You cannot get into trouble if you don't say nothing about it." He said, "You tell that big-mouthed son-of-a-Bitch to worry about himself". I said, "Nothing
947 is going to happen; everything will be all right."

Q. Before you had that talk with him, did he say anything about Sonnenblick on Sunday? A. He did. He says, "When he switched over from his clothes into like what he works in, like he works on mechanic work, he left the address that I gave him in the suit," he says, "and I called up a couple of times trying to get you but I could not get you," he said, "Where were you?" I said, "Maybe I was by the Melrose, I know I
948 was around".

Q. What is the Melrose? A. The Melrose is a restaurant on Avenue C and 7th Street. So he says, "I called you a couple of times. I tried to get in touch with you." I said, "What was it all about?" He said, "I left the address in the other suit and I tried to get you to get the address over again. I was all the way out in the asshole of Brooklyn; I was on the right track and I went lost. I could not remember the address." I said, "Why didn't you call your wife up and get the address out of your pants?", and he was giving me a lot of—

Q. Tell us what he said. A. He said, "It ain't important now. I will do it during the week".

Q. Did he say what time he was out in Brooklyn? A. Yes, it was getting kind of close to the nine mark, he said, and he knew he had to go back, so the first load he seen—

Q. The first what? A. The first load. That means a car.

By the Court:

Q. That is the underworld word for "car"? 950
A. Yes, sir.

Q. All right. A. He said, "The first load he seen that looked anyway decent he just stepped in it and he shot all the way back from Brooklyn to New York, and that he picked up Malinski on 8th Street, and then he rode over to Houston Street and picked Ebbie up.

Q. Rudish told you this? A. That is right.

Q. Go ahead. A. Then they shot out to the Island.

Q. Did he say anything else from that point on? This is on Rudish. Did Rudish tell you anything 951
on Sunday in addition to what you have told us?
A. That is all I remember.

Q. This term that you say was used with respect to Malinski, you say that Rudish called him that word? A. What is that?

Q. The word that you gave us before in your testimony, what they called Malinski, you said Rudish told you that? A. That is right.

Q. About being a dog—something? A. Yes, that is right.

Q. With respect to that, was anything further said by Rudish on that subject or something fol-

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lowing that? A. Yes, he also told me, he said, "I would rather starve to death before I ever step with that bum again". In other words—

Mr. Carabba: I object to the "in other words".

The Court: Objection sustained.

Q. Don't tell us "in other words". Just tell us what he said. Was there anything else said
953 about Coney Island by Rudish?

Mr. Carabba: Of course that is leading. He already testified he does not remember any more.

The Court: Go ahead.

Q. About Coney Island: anything said by Rudish in addition to what you have told us about Coney Island? A. Yes, he says, "That we had it all made up".

Q. Anything extra? Anything in addition to what you told us about that? A. (No answer.)

954 Q. Have you given us all the conversation you had with Rudish on Sunday, the 16th of February? A. (No answer.)

Q. Anything else? A. That is all I can remember.

Q. Did Rudish tell you anything about what happened after the policeman was shot? A. He did.

Mr. Carabba: I object to that is leading. I have sat here and the District Attorney has—

The Court: Now wait a moment. The District Attorney has exhausted the witness' recollection, and he may call his attention to one or two items without unduly leading him. Your objection is overruled.

Mr. Carabba: Exception.

The Court: It is perfectly proper in the trial of a case. Proceed, Mr. District Attorney.

Q. Tell us about that, please. A. He told me, 956
he says, after he got away from the hoist, after he dropped the car, he went up on the—he got up on the Stillwell Avenue station.

Q. Who did? A. Rudish. He says it sounded like all the sirens in New York was in Coney Island that night. Between that and the fireworks, the shooting he meant, he said he was going insane waiting for the train to come along.

Q. Did he tell you where he went after he got on the platform? A. He did.

Mr. Carabba: I object to that as leading. 957

The Court: Objection overruled.

Mr. Carabba: Exception.

The Witness: He said after he got the train, he shot all the way back to New York, to the Citadel Club.

Q. Go ahead; anything else? A. Well, he told me he brought a pair of plates back with him, a pair of license plates.

Q. Anything else in addition to that conver-

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sation about going back to the club? A. (No answer.)

Q. Did he say what time he went home that night? A. What time he went home?

Q. Yes. A. Yes; he said he left about two o'clock.

Q. Anything else said, if you recall? A. Well, I don't recall.

Q. Was there any mention made of money by Rudish on Sunday?

959

Mr. Carabba: Your Honor pleases, I object.

The Court: Objection overruled.

Mr. Carabba: May I take an exception on the record?

The Court: Yes, everything you say is going on the record without you asking the Court for the exception. Every word that is uttered here in the courtroom goes on the record. Proceed, please.

The Witness: He said that there was

960 not much money there. They got about 220 apiece.

By Mr. McGough:

Q. $220? A. Yes, sir, but Malinski, he got an extra $20 on account of that two of his pieces was used, so Ebbie said to him, "Take an extra double sawbuck for the pieces."

Q. Do you recall sometime in October 1942 being present while Morris Malinski was being interrogated by the District Attorney? A. I don't know what you mean by that.

Q. Being questioned? A. Questioned, yes.

Q. That was about the time of his arrest, is that right? A. That is right.

Q. By the way, did you write to anybody and ask to be brought down from Sing Sing to testify?

Mr. Solovei: I object to that.

The Court: Objection sustained.

The Witness: I did not.

The Court: Wait a moment; the objection is sustained. Strike out the answer. 962

Q. Will you tell us, please, whether or not at the time that Malinski was being questioned you had occasion to talk to him? A. I did.

Q. And is that in reference to this particular case? A. Yes.

Q. Will you tell us, please, what Malinski said to you at that time and what, if anything, you said to him?

Mr. Solovei: May we have the time, please? 963

The Court: Yes.

Q. Can you fix the date, Spielfogel, about when? A. It was in October, about two weeks after I came down. I don't remember the exact date.

Q. What year, please? A. 1942.

Q. Can you tell us where that took place? A. In the Hotel Bossert.

Q. Tell us what Malinski said and what you said.

Mr. Morritt: I object to that as to Rudish.

The Court: Objection sustained.

The Witness: I did not say anything. He asked one of the Lieutenants if he can speak to me, so I would not speak to him, so he started in like almost going to bawl. They all said, "Go over and see what he wants"; so they let me go into the next room with him and he said to me, "Listen,
965 Slip".

Q. Who said to you? A. Moish.

Q. Tell us what he said. A. He said, "I know they got Jake in the other room otherwise they cannot know so much." He said, "They know too much already". He said, "I might as well go out there and tell them the rest and get it over with", so I said to him, "Well, you are over 21. You know what the score is; do what you want." So he asked the Lieutenant, he said to him, "I will tell the truth but I don't want
966 to go to the chair for this," so the Lieutenant says to him, "I cannot promise you anything." He says, "This is a police case. You will have to take your chance. Whatever happens, happens," so Malinski said, "I would like to bring a rabbi in or a fellow by the name of Nat Math."

By the Court:

Q. Nat who? A. Math, I believe.

Q. Math? A. Yes. He said, "I would like to talk to him before I say anything," so the

Lieutenant says, "This is my case. You have got to take your chances," and then he started to tell everything.

By Mr. McGough:

Q. Who started telling everything? A. Malinski told the Lieutenant.

Mr. McGough: All right; you may inquire.

The Court: This is going to be a protracted cross-examination, I take it? It may take some time? 968

Mr. Carabba: Yes.

The Court: Suppose we take a few minutes' recess at this time and then we will continue on until about 6 o'clock. Gentlemen of the jury, do not discuss the case while you are out and keep your minds open until the case is finally submitted to you.

(Recess.)

969

NATHAN SPIELFOGEL, resumed.

Mr. McGough: May I ask just one or two questions?

The Court: Yes.

By Mr. McGough:

Q. I show you People's Exhibit B for identification and ask you if you can identify that

as the hat that you testified about here before the recess?

Mr. Morritt: Objection, may it please the Court.

The Court: Objection sustained as to form.

Q. Will you examine People's Exhibit B for identification that I now hand you, please?

971

The Court: Look at it.

The Witness: Yes.

Q. Can you tell us whether or not that is the hat that you testified Malinski wore at the time you say he received it from Hersh Levine? A. I don't know if it is this one but one just like that.

Mr. Solovei: I move to strike the latter part out.

The Court: Motion denied.

972 Mr. Solovei: Exception.

Q. One just like that, is that what you said? A. Exactly.

Mr. McGough: That is all.

Mr. Solovei: Now if your Honor pleases, on behalf of the defendant Malinski, in view of this man's testimony relative to conversations had between him and Beitler, and this not in the presence of the defendant Malinski, I move for the declaration of a mistrial.

The Court: Motion is denied.

Mr. Solovei: Exception.

Mr. Geoghan: I ask to strike out all the testimony of this witness as to Indovino, on the ground that he has merely testified to what Yellin told him, and the conversation was not in the presence of Indovino.

The Court: Mr. Geoghan, I have ruled on the objection and I have sustained it in each instance where the testimony was 974
not had with the defendant Indovino. I have sustained your objection.

Mr. Geoghan: That is all right.

The Court: Whatever somebody else said about Indovino, subsequent to the time of the commission of the alleged offense, is certainly not binding on Indovino. Is that satisfactory?

Mr. Geoghan: Yes, that is all right.

Mr. Carabba: I think your Honor ruled this morning that all witnesses on both sides be excluded from the court- 975
room?

The Court: Yes.

Mr. Carabba: I understand that Mr. Heffernan is going to be a witness here.

Mr. McGough: I understand to the contrary.

The Court: I do not know that.

Mr. Heffernan: I will be glad to withdraw, Judge.

Mr. Carabba: I heard he is going to be a witness and I thought the Court's order should be respected.

976 Mr. McGough: I did not intend to call him.

The Court: He may be a witness?

Mr. McGough: Excuse me?

The Court: He may be a witness?

Mr. McGough: He may be, but I am not planning on it.

The Court: It is cooler outside, Mr. Heffernan. You had better step out. Please retire.

977 *Cross-examination by Mr. Solovei:*

Q. Spielfogel, you are known as Slip, is that right? A. That is right.

Q. Is that right? A. Yes.

Q. And do you mind if I call you Slip for convenience? A. No, that is all right.

Q. Now Slip, you gave us a pretty minute detailed discussion of everything that happened on the night of February 15th, is that right? A. I believe so.

978 Q. You remembered everything very clearly and very distinctly as to what each one of these defendants told you at different times, is that right? A. That is right.

Q. When they told it to you, you made no memorandum of it, did you? A. I did not.

Q. And this was sometime in 1941 that they told it to you, is that right? It was sometime around 1941 that you had these conversations? A. That is right.

Q. And after that you had considerable trouble of your own, didn't you? A. A few months after.

Q. You had some—at least one stickup case, anyhow, didn't you? A. What was that?

Q. You at least had one stickup of your own where you were involved? A. That I was arrested for?

Q. What? A. Do you mean that I was arrested for?

Q. That you are now doing time, 30 to 60 years? A. That is right.

Q. Before that, did you have any other stickup cases that you were not arrested on? A. No, sir. 980

Q. Or some cases where you shot and killed somebody that you were not apprehended? A. I never killed anybody.

Q. When you went out with your revolver and you were armed, you went out to protect yourself in the event of being apprehended, you were ready to shoot? A. But I did not.

Q. But you would, if you had to, wouldn't you?

Mr. McGough: That is objected to.

The Court: Objection overruled.

981

Q. You would shoot your way out if you had to, wouldn't you, Slip? A. I would not.

Q. You would not shoot if you were cornered? A. No.

Q. When you were arrested in New York for the crime committed on May 10, 1941, Yellin was your co-defendant, is that right? A. That is right.

Q. You went up to a poolroom there and you stuck up a number of people with loaded revolvers, didn't you? A. That is right.

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Q. And you were convicted of that robbery, is that right? A. That is right.

Q. And you were also convicted for having a loaded revolver on your person, weren't you? A. No, sir.

Q. Didn't the jury find you guilty of robbery in the first degree and also of having a loaded revolver in your possession, and you got 30 to 60 years on the robbery charge, and a suspended sentence on the other charge? A. That is right,
983 but I did not have no gun on me at the time.

Q. What? A. I didn't have no gun at the time when I was arrested.

Q. You mean the gun was found under your car, wasn't it? A. In my car?

Q. Well, the gun was found under the car and the police claim they saw you throw the gun under the car when you made your getaway, is that right? A. That is what they claim.

Q. And that is what you were convicted of, is that right? A. Yes.

Q. And when you were arrested you had three
984 holes in your pants, showing that three shots were fired from your pants pocket, is that right? A. I had a couple of holes but there was not three shots fired.

Q. How many shots were fired out of your pants pocket? A. One shot as far as—that was fired at me.

Q. They were fired from your pocket, out of your pants pocket, weren't they? A. (No answer.)

Q. What is that? A. No.

Q. A minute ago you just said as far as you

know there was only one hole? A. There were three holes.

Q. There were three holes, is that right? A. A few holes.

Q. And the holes were from your pants pocket, showing that you discharged three cartridges from your pocket with a revolver, is that right? A. I did not discharge any shells from my pocket.

Q. Do you mean that they fired three shots at you? A. No, sir. I don't know myself how I got 986
the holes in my pocket.

Q. You don't know how you got those three bullet holes in your pocket? A. I don't even know if they were bullet holes.

Q. What kind of holes do you think they were?

Mr. McGough: That is objected to.

The Court: We are not going to try out that case as to what the holes were. Proceed. Can you get any more out of him than that he is a yegman and a stickup man, and a gunman and a convict, doing 30 987
to 60 years? Do you want to impeach his credibility any further than that? Go ahead and show that he can be any worse than that. If you can do that, go ahead and do it. He is a stickup man, a gunman and a convict in Sing Sing; a robber. Do you want to paint the lily any more. Go ahead.

Mr. Solovei: I think your Honor painted a fair picture.

The Court: It is res ipsa loquitur as they say in Latin. It speaks for itself. I will

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permit you to go further if you desire to go further.

Q. Where did you say you lived in February 1941? A. February 1941?

Q. Yes. A. I lived at 92 Lewis Street.

Q. 92 what? A. Lewis Street.

Q. In New York? A. That is right.

Q. I understood you to say that you were married? A. Sir.

989 Q. What? A. What was that?

Q. Were you married then? A. I was.

Q. Did you actually have a marriage ceremony performed between you and your wife? A. I should hope to smile, I did.

Q. You should hope to smile you did? And you said on your direct examination, you said something about, "When I put a gun in my hand, I do not want to worry about any after effects". Do you remember saying that? A. Yes, that is right.

Q. And I take it that you meant by that, when
990 you go out on a job with a gun, when you went to do a job so that you left no traces behind, is that it? A. That I don't have to worry later about anybody giving me up.

Q. And leave no traces behind? A. What do you mean traces?

Q. Well, I mean you want to do a good job so they cannot fasten the liability on you afterwards? A. That is right.

Q. You called Morris Malinski, Moish, is that right? A. That is right.

Q. Moish means in the Jewish language, Morris, don't it? A. Morris, yes.

Q. Now what time was it on the 15th of February for the first time that you saw Malinski? A. What do you mean, when he come back?

Q. The first time you saw him on February 15th, what time did you see him? A. The first time?

Q. Yes. A. I seen him about 10:30 that morning, Saturday morning.

Q. Saturday morning at 10:30? A. That is right. 992

Q. Where did you see him? A. Tenth Street and First Avenue, where he used to work.

Q. Where he worked? A. That is correct.

Q. Did you go over there to visit him? A. I did.

Q. And at that time there was no particular conversation that you had in reference to this case, was there? A. To this case? No, not at the time.

Q. You just paid him a friendly visit, is that it? A. Not a friendly visit.

Q. What? A. It was not a friendly visit, is that it? A. Not a friendly visit. 993

Q. What? A. It was not a friendly visit.

Q. It was not a friendly visit? A. No.

Q. Was it a business visit? A. That is right.

Q. What business did you have to visit him? A. What do you mean?

Q. What business did you have?

By the Court:

Q. What did you go there for, he means? A. We were supposed to go some place to do a job.

By Mr. Solovei:

Q. You and he? A. That is right, and somebody else.

Q. That day? A. That morning; that afternoon.

Q. And he was working? A. That is right.

Q. And he remained on his job working, is that right? A. No.

Q. Didn't he stay on the job where he worked?

The Court: Do not shake your head.

The Witness: No.

Q. You said something about seeing him about 1:30 a. m.? A. Saturday—

Q. After 10 o'clock— I withdraw that. After 10 o'clock on the 15th of February 1941, did you see him later on about 1:30 a. m.? A. 1:30 in the morning, yes. In other words, that will be Sunday morning.

Q. Yes, and that is the time you say you saw him at your house? A. That is correct.

Q. And then he told you about a shooting match, is that right? A. That is right.

Q. And you said, "Wait until I get dressed and we will go out together and talk it over"; is that it? A. I says I did not want him to talk in front of my wife.

Q. So that the conversation he had with you originally was said to you privately and you immediately stopped the conversation and went out, is that right? A. That is right. As soon as I got dressed I left.

By the Court:

Q. Was there anything said in the presence of your wife by Malinski? A. She probably heard it. I am not sure.

Q. Was there anything said by Malinski to you while your wife was in the same room? A. No, she was in the next room.

By Mr. Solovei:

998

Q. And then you got dressed and you went to the Citadel Club, is that right? A. No, before that there, I only went downstairs. Then he told me about a hat and I went back upstairs and gave him my green one.

Q. You mean he told you about the hat and you went upstairs? A. As soon as we were downstairs.

Q. And then you went back and got the hat for him, is that right? A. That is right.

Q. And then you went to the Citadel Club, is that right? A. That is right.

999

Q. And then he related the story to you as you told it here, about he and Ebbie? A. Beitler, Ebbie.

Q. Ebbie; that he and Beitler or Ebbie, the two of them did some shooting, is that right? A. That is right. He says, "We had a shooting match."

Q. He said and he told you that he and Beitler both fired how many shots? A. I think he said two each.

Q. Two each? A. Yes.

Q. That is four shots in all, two each, is that right? A. Yes.

1000 Q And I think you told us that those shots came from different guns, is that right? A. I don't think I said anything about that.

Q. Did they come from different guns? A. They did.

Q. I think you said it came from a .38 and a .45, did you? A. That is right.

Q. That is what you said on your direct examination, didn't you? A. I don't know whether I was asked that. I don't remember.

1001 Q. And those guns I think you said belonged to you? A. No, never belonged to me.

Q. Aren't they the same guns that you used in the stickup of May 10, 1941, in New York? A. No.

Q. Wasn't there a .38 used there? A. I don't know what was used there. I seen a .38 when I went to the job but I had no part of it.

Q. You had a .38 on you, didn't you? A. I never did.

Q. What caliber gun did you have on you at the time when you went to stick somebody up on May 10, 1941? A. I had no gun at all.

1002 Q. Did Yellin have his gun? A. Yes, sir.

Q. How many did he have? A. Two.

Q. And he kept the two of them for himself? A. No, the other fellow had one, too.

Q. But just you and Yellin were on trial though in New York? A. That is right.

Q. Do you know a man by the name of Joseph Cardinall? A. Cardinall? I don't.

Q. What? A. Did you say Cardinall?

Q. Yes. A. I don't.

Q. You don't know him? A. No.

Q. Now did I understand you to say on your

direct examination that Malinski told you that he and Ebbie both jumped out of the car and fired these shots at the police officer? A. You didn't hear it from me.

Q. Did anything like that—did you say anything like that? A. Not the way you said it.

Q. You tell us how he said it. A. Beitler was on the corner waiting for the cop to come down with the pay-man.

Q. Yes? A. And Malinski was sitting in the car with Jake and when Ebbie gave him the 1004
signal and the pay-man passed him, that is when Malinski came out of the car. He was coming up close to the box.

Q. And while Beitler was on the corner, he said that Beitler fired two shots and he fired two shots, and that is what dropped the cop, is that it? A. Not on the corner. He had to go over towards him.

Q. Beitler walked over to him? A. That is right.

Q. And did he tell you whether or not Beitler was the one who grabbed the paymaster or the 1005
fellow who had the bag with the money? A. He did.

Q. What? A. He did.

Q. He said Beitler grabbed him? A. He went for the money.

Q. And did he say that he helped Beitler grab the money? A. No.

Q. Did he say that he grabbed hold of the man who had the payroll while Beitler grabbed the money? A. He did not.

Q. Well, was there something or words to that effect said to you? A. He did say he was right

1006 outside the car by the door, he says. He hollered to the pay-man, "Stand there—stay there or I will drop you".

Q. That is, Malinski hollered to the pay-man? A. Yes.

Q. Is that right? A. Yes.

Q. And then Beitler was the one who grabbed the pay-man together with the money? A. Yes, sir.

Q. Is that right? A. Yes, sir.

1007 Q. And then he rushed back in the car? A. Malinski was already in the car.

Q. And Beitler then jumped back in the car and they made their getaway, is that what he said happened? A. Yes, sir.

Q. And you remained at the Citadel Club about three-quarters of an hour? A. That is right.

Q. How many people did you find there when you got there? A. There was nobody there. There was only Malinski and myself. You see, they had the whole building, the Citadel Club.

Q. Not a soul there at all? A. There were
1008 people upstairs, guys and girls mushing it up, if you mean that.

Q. Any of your friends over there that you spoke to that night? A. Over there?

Q. Yes. A. No, I did not speak to anybody that I can remember.

Q. Did you see Malinski talk to anybody at the Citadel Club? A. Only to me.

Q. What? A. The only one he spoke to was me.

Q. Outside of you,—did you meet anybody that you knew at the Citadel Club that night? A. I didn't see anybody.

Q. Not a soul? A. We were alone.

Q. How did you go from your house on Lewis Street to the Citadel Club? A. Straight through Columbia Street, down Avenue D to 3rd Street, from 3rd Street to Avenue C, you make a right turn and it is right on the corner.

Q. Did you walk? A. That is right.

Q. While walking from your house to the Citadel Club, did you meet anybody that you knew? A. I don't—

Q. What? A. I didn't meet anybody. 1010

Q. You didn't meet anybody at all? A. No, I didn't stop to speak to anybody.

Q. What? A. I didn't speak to anybody.

Q. Well, when Malinski appeared at your house that morning, your wife was fast asleep, is that right? A. She woke up when he started banging.

Q. What? A. She woke up when he started knocking.

Q. You went to the door and opened the door? A. Yes, sir.

Q. When you say she woke up, she remained in bed? A. No, she got out. 1011

Q. She got up and got out? A. Yes, sir.

Q. She got dressed? A. She was angry. She said, "If you go out now, don't come back. If your friends are more important, go with them."

Q. She wanted you to stay home? A. That is right.

Q. Now you met Beitler later on with Jake? A. When do you mean?

Q. After Malinski left, was that the same night? A. No.

Q. After you and Malinski left the Citadel Club, did you go from there to Essex and Delancy Street where Malinski went home? A. No, sir.

Q. Well, did you go anywheres else from there? A. Yes, sir.

Q. Where did you go? A. We stopped at the Melrose Restaurant for a couple of seconds, and then we went over to 10th Street and Avenue C. We got a bus and we went as far as 9th Street
1013 and First Avenue, the 10th Street Crosstown bus takes you to 9th Street and First Avenue, and Malinski's store happens to be one block away, where he worked.

Q. Yes? A. And he had the keys and he put all the change that was taken on the holdup in the store. He took the change Monday.

Q. You didn't say anything about that on your direct examination?

Mr. McGough: I object to that. A lot of things people say on cross-examination that they do not say on direct examina-
1014 tion.

Mr. Solovei: Is that so?

Mr. McGough: I ask the Court to instruct counsel not to make any comments when I make an objection. Those observations are unfair and are uncalled for.

The Court: Proceed.

Q. You did not say anything about that on direct examination?

Mr. McGough: I object to that.

The Witness: I am not a mindreader—

Mr. McGough: Wait a minute. I have objected to it.

The Court: Go ahead; overruled.

Mr. Solovei: Your Honor does not mean by using your hand, that it is not important?

The Court: I said overruled. I have ruled.

Q. Slip, you did not say anything about that on your direct examination, did you? A. I don't think I was asked that. 1016

Q. He asked you to tell everything you knew about the case and all the conversation you had with the defendant Malinski and you gave it on your direct examination.

Mr. McGough: May I register my objection to that, please?

The Court: Objection sustained.

Mr. Solovei: I except.

The Court: Proceed.

1017

Q. You now say that the reason why you didn't tell that on your direct examination was because you were not asked, is that right? A. (No answer.)

Q. Is that right? A. That is right.

Q. You have been in courts many times and you have had a good deal of experience in courts, haven't you?

Mr. McGough: I object to that as argumentative.

The Court: Objection overruled.

Q. Haven't you? A. What was that question?

Q. I say, you have been in courts many times and had a good deal of experience in courts, haven't you? A. I don't know much about court.

Q. You have been tried several times, haven't you? A. I was tried once—twice, to be correct.

Q. But you were in court at least a dozen
1019 times, weren't you?

Mr. McGough: I object to that.
The Court: Objection sustained.
The Witness: No sir.
Mr. Solovei: Exception.
The Court: Proceed.

Q. You now say that he went over to the place where he worked and you say he put the change in, is that right? A. Yes, that is right.

Q. And you went with him, is that right? A. That is right.

1020 Q. And you went in the store with him? A. I didn't go in the store. I was outside.

Q. You waited outside? A. Yes, sir.

Q. What time of the morning was that? A. I will say about a little after two; maybe ten after two; something like that.

Q. A little after two in the morning? A. Maybe 2:30; around that time.

Q. Well, it was about 1:30 when he first knocked on the door of your house, is that right? A. That is right.

Q. And then you got dressed? A. Yes.

Q. And then you walked over to the club? A. That is right.

Q. And you didn't get there until after 2 o'clock, isn't that so? A. After two? It only takes about five minutes to be exact to walk from my house to the club.

Q. About five minutes? A. Oh, five or six minutes.

Q. And you remained at the club about an hour? A. Not an hour.

Q. How long did you remain at the club? A. 1022
I will say about half an hour; maybe 40 minutes; 30 minutes, something like that.

Q. On your direct examination you said three-quarters of an hour, is that about right?

The Court: Well, he says now 40 minutes. Go ahead.

Mr. Solovei: Yes.

The Court: May I ask a question, please? Was there anything said between you as to why you were to go to the Citadel Club? What was the object of going to the Citadel Club? 1023

The Witness: He wanted to talk to me.

Q. And I believe you said that he told you that the cop was pegging away, is that right? A. After they got in the car.

Q. And then you said that he told you that Ebbie and he grabbed a cab and they went to New York, is that right? A. That is right.

Q. As a matter of fact, you said they grabbed

two cabs, is that right? A. They switched from one to the other.

Q. What? A. First they had one and then they took the other.

Q. And then they split the proceeds over at the club, you told us, is that right?

The Court: He nodded. He did not answer. Answer, please.

The Witness: Yes.

By Mr. Solovei:

Q. Did you say the guns belonged to Red the Tippler? A. I did not.

Q. By the way, Slip, you and Yellin were out to lunch together, weren't you? A. Today? Yes.

Q. Yes. A. Yes.

Q. And who else was out to lunch? A. Mr. Anderson

Q. Who else?

The Court: Who is Mr. Anderson?

The Witness: The gentleman over there.

Mr. McGough: Detective Anderson?

The Witness: Detective Anderson.

By Mr. Solovei:

Q. And who else? A. Eisler, the Tippler.

Q. The Tippler? A. Yes, and Mr. Casey, Detective Casey.

Q. Did Beitler ever go out on jobs with you at some time or another? A. He never did.

Q. He is a good friend of yours? A. He ain't a very good friend of mine. I just know him.

Q. You know him pretty good? A. Just from the neighborhood.

Q. What? A. Just from the neighborhood.

Q. Did he ever supply you with guns? A. Not me.

Q. Not you? A. No.

Q. But you have seen him at some time or another with guns, haven't you? A. I never did see him with guns. 1028

Q. Now on your direct examination you said that you put the guns in the store, is that right? A. What do you mean? When they come out of the cellar?

Q. I am asking you, did you say that? You said before, "I put the guns in the store". Is that what you said? A. In the store?

Q. Is that right? A. In the toilet of the store.

Q. What? A. In the toilet.

Q. You put the guns in the toilet in the store? A. Yes.

Q. When was it that you put the guns in the toilet in the store? A. Saturday morning. 1029

Q. How many guns did you put in the toilet in the store? A. Four, to be exact.

Q. And they were your guns? A. No, sir.

Q. They were Tippler's guns? A. No, sir.

Q. Were they the guns you used on the stickup on May 10, 1941? A. No, sir.

Q. Prior to your conviction and going to jail on this charge, you always carried a gun, didn't you? A. I did not.

Q. Now what time was it that Malinski left you on the morning of February 16th? A. The 16th?

1030 Q. Yes. A. It must have been about four in the morning.

Q. You went from his store, as you said, after he went over there and deposited this change, you then went to Essex and Delancey Street? A. No, sir.

Q. Or the Melrose? A. No, sir.

Q. What happened after that? A. We went to his sister's house.

Q. You went to his sister's house? A. Malin-
1031 ski.

Q. At what address? A. I don't know the address, but I know where the building is. It is on 10th Street.

Q. In New York or Brooklyn? A. New York.

By The Court:

Q. What part of 10th Street? A. Between First and Second; more to First.

By Mr. Solovei:

1032 Q. You mean, you and Malinski went to his sister's house? A. That is right.

Q. Well, you didn't tell us that on your direct examination, did you? A. I don't know whether I did or not.

Q. Did you just think of it? A. I didn't think of it, I had it in my mind all the time because I was there. I know.

Q. Well, from the store where you and he went to, was it the first place that you went after that, his sister's house? A. After he put the change away?

Q. Yes. A. No, first we were across the street by the restaurant.

Q. What restaurant? A. There is a Greek restaurant across the street from the place where he works.

Q. What is the name of that restaurant? A. I don't know the name of it. It is right on 16th Street and First Avenue.

Q. It is not the Melrose you are talking about? A. No, I am talking about First Avenue.

Q. So that is another element you forgot to tell us about? 1034

Mr. McGough: I object to that as an unfair question. It is really an observation.

The Court: All right; he may answer.

The Witness: When I walked in there —what do you want me to remember; everything?

Q. Your memory is pretty good, isn't it?

That is objected to. 1035

The Court: Objection overruled.

By Mr. Solovei:

Q. Isn't your memory pretty good? A. I say fair.

Q. You have remembered almost everything in detail that you say Malinski told you, didn't you, except to these few matters that I called your attention to, you remembered everything, didn't you? A. That is right.

Q. Is that right? A. Yes.

Q. And you carried that in your mind all that time from 1941, February, up to the present time that you were brought here as a witness, is that right? A. No, sir.

Q. But from February 1941 up to the present time you never put those matters down in writing that he spoke about to you? A. I never put that down in writing.

Q. Now when was it for the first time in your life that you told anybody at all about what you
1037 testified to here? A. The first time I spoke to anybody was up in State's Prison.

Q. All right, give us the time. A. I don't know the exact time.

Q. Give us the month. A. I don't know the month.

Q. You cannot give us the month? What year was it? A. I think it was right after I was arrested, after I was up there about say about six months, I guess.

Q. It was after you got your 30 to 60 years, is that it? A. That is right.

1038 Q. Well, see if we cannot refresh your recollection. You got your 30 to 60 years in December of 1941, is that right? A. 1941, correct.

Q. Now you then went to Sing Sing Prison, is that right? A. Yes, after I got my sentence; yes.

Q. Were you at Sing Sing or were you at Dannemora? A. Sing Sing Prison.

Q. Were you all the time at Sing Sing? A. Yes, sir.

Q. Now after you were at Sing Sing, how long were you at Sing Sing when you finally made your first statement to anybody what you

related to and testified to here?" A. I did not make no statement to nobody in there but we were talking about this particular case—

Q. What? A. I was talking to this fellow about this particular case.

Q. Whom were you talking to about it? A. The fellow's name is Lawrence—I just can't think of his second name now.

Q. Don't you know his last name? A. Kurt Lawrence, I think it is.

Q. What? A. Kurt. I know his first name 1040
is Kurt.

Q. Kurt, K-u-r-t? A. K-u-r-t.

Q. Kurt Lawrence? A. I believe that is the name.

Q. Is that one of the inmates up there? A. He was there at the time I was up there.

Q. And he was doing a prison sentence the same as you? A. Yes, sir.

Q. And then you just got in conversation with him, is that right? A. That is right.

Q. How long had you known this Kurt Lawrence before you got into conversation with 1041
him? A. Maybe a couple of months; maybe three months.

Q. What? A. A couple of months.

Q. Just a couple of months? A. Yes.

Q. Your friend Yellin was up there, too, wasn't he? A. He was.

Q. And did he get in the conversation with Kurt Lawrence, too? A. I don't believe he did.

Q. Do you know what Kurt Lawrence was sent up there for, or how long a stretch he had? A. I believe it is from 15 to 30.

1042 By the Court:

Q. I would like to know what happened up at the sister's house. What happened up there when you and the defendant Malinski went from the store, or shortly thereafter, to the sister's house? A. He told me he wants to stake her.

Q. He wants to what? A. He wants to stake her on a few bucks. In other words, give her a few dollars, and he don't want to go home be-

1043 cause the parole officer might be around, so he wants her to talk to the brother-in-law for him to stay there.

Q. I don't understand you; speak up louder. A. He wanted his sister to talk to his brother-in-law so he could stay there for the rest of the night.

Q. At his sister's house, you mean? A. Yes.

Q. What about the parole officer? A. If he went back to Brooklyn, he figured maybe the parole officer would be around at that time in the morning.

Q. Did you actually go with him to his sister's

1044 house? A. I did.

Q. What part of the house did you go to? A. I went all the way up into the house, into the kitchen.

Q. Into his sister's apartment? A. That is right.

Q. With him? A. That is right.

The Court: Go ahead.

By Mr. Solovei:

Q. Do you know his sister's name? A. I

guess it is—I think it is Shirley, if I am not mistaken.

Q. What is her name? A. I think it is Shirley.

Q. Shirley? A. Yes.

Q. Shirley what? A. I don't know the second name. I think it is Pisa.

Q. Pisa? A. Pisa; something like that.

By the Court:

1046

Q. Describe her. A. What was that, sir?

Q. What does she look like? A. She is about 140 pounds, I say, and about 5 foot 5; about 40 years; 38 years of age.

Q. What color hair has she got? Is she blonde, brunette or what? A. I think she is a brunette; I am not sure.

Q. Do you know her nationality? A. She?

Q. Yes. A. Jewish.

Q. Would you recognize her if you saw her? A. I would.

Q. Could you pick her out? A. Sure.

1047

The Court: All right; go ahead.

By Mr. Solovei:

Q. Now did you ever go over to his sister's house before that night? A. Before that night?

Q. Yes? Did you? A. I don't remember.

Q. Did you ever see his sister before that day? A. I did.

Q. So you knew her from before, didn't you? A. I knew her.

Q. You are not giving the Judge a descrip-

1048 *Nathan Spielfogel—For People—Cross*

tion of a lady you saw that night as the sister of the defendant because of the fact that you saw her on that night for the first time, are you? A. It was not the first time I seen her.

Q. And you say this girl Shirley is about 140 pounds and is about 5 foot 5 in height, is that right? A. That is to my thinking.

Q. What? A. That is to my thinking. That is the way I figure it.

Q. You saw her on the street at different
1049 times? A. That is right.

Q. Does she live near you? I mean, at the time in Lewis Street, did she live near you? A. Near me? No, that is about fifteen blocks from where I am.

Q. Fifteen blocks from where you lived at Lewis Street? A. Yes, sir.

Q. What was the street that she lived on at the time? A. Stanton and Lewis.

Q. Stanton and Lewis? A. That I lived at?

Q. No, no, the sister: how far did she live from where you lived? A. About 15 blocks
1050 away from me.

By the Court:

Q. Had you ever been in this house before? A. Before this?

Q. Listen to my question. Listen carefully to what I am asking you. Had you ever been in his sister's house before this early morning hour. Had you ever been there on any other occasion before that time? A. No.

Q. Have you ever been there since? A. Since?

Q. Since. A. I was there after that, too.

Q. You were there after when? A. The next day, Sunday.

Q. But this was the first time you were there on this night after you were at the Citadel Club with the defendant Malinski? A. That is right.

Q. And after you say he went to the store, where he was employed? A. That is right.

Q. Now what kind of a building is it where his sister lived at that time? A. Just a few steps to go up. I think a four-or-five-story 1052
building; I believe it is four-story building.

Q. On what floor did the sister live? A. I think it was the third, to the back.

Q. In the rear? A. Yes, on the left-hand side.

Q. On the left-hand side? A. Yes.

Q. On the left-hand side as you go up in the hall? A. When you go up the steps—

Q. Describe it in your own way. I want you to give me a description of the place that you say you were in on the morning after this policeman was killed. A. That is right.

Q. Give me a description of the place. A. 1053
The inside?

Q. Tell us in your own words what the place looked like, what floor the apartment was on, what room you entered; a description of the place that you saw there, and tell us something about it. A. Well, before you enter the building, you walk up about four steps and then you enter the building.

Q. Which side of the street; is it on the south side or the north side? A. On the up town side.

Q. That is the north side of the street? A. See, the store is right around the corner.

Q. This is on what street? A. Tenth Street.

Q. Tenth Street runs east and west? A. Yes.

And one side of the street is the north side and one side is the south side? A. Yes.

Q. The up town side is the north side and the down town side is the south side, is that right? A. I know it is on the up town side.

Q. It is on the side nearest 11th Street? A.
1055 Yes, sir.

Q. Between what avenues is the sister's house located on? A. What avenues?

Q. Yes. A. Between First and Second Avenue on 10th Street. It is more to First Avenue.

Q. Nearer to First Avenue? A. That is correct.

Q. And give us a description of the house, if you remember it? A. It was about three flights up, on the left-hand side to the rear. As soon as he opened the door, there was a kitchen. You step right into the kitchen.

1056 Q. You go right into the kitchen? A. Yes.

Q. Yes? A. You mean, I should say what I saw there?

Q. Tell us what you saw and what happened there. Give us a description of the place. A. All I seen him do is talk to his sister and I walked to the sink and took a drink and walked back out to the hall. I felt I was not wanted as he wanted to talk to her private.

Q. But you were actually in the kitchen? A. That is right. It was dark and they did not have the lights on and he spoke to her a few minutes and then I heard him say when I was out in the

hall, "Get back to bed", to somebody; I don't know who he was talking to.

The Court: Go ahead, Mr. Solovei.

By Mr. Solovei:

Q. You have seen the defendant Malinski around his sister's house on many occasions, haven't you, or in front of his sister's house, haven't you? A. In front of the sister's house?

Q. Yes. A. A couple of times in front of his 1058
sister's house.

Q. So when you are giving the Judge a description of what kind of a house it is and where his sister lived— A. Something like that—

Q. —you knew where she lived all the time? A. Sure, I knew where she lives.

By The Court:

Q. You say you were up in the sister's house the next day, too? A. That is right.

Q. With whom? A. With Malinski. 1059

Q. That would be Sunday? A. Yes, Sunday.

Q. How did you come to go there on Sunday? A. His girl was living up there and he wanted to speak to her.

Q. He wanted to speak to his girl? A. Yes, that is right.

Q. Living in his sister's house? A. That is correct.

Q. Did you go with him there? A. That is right.

1060 Q. Did you actually go into the apartment? A. I did not.

Q. Where were you on Sunday? A. Down at the stoop.

Q. What I am trying to get at is this, gentlemen, addressing Counsel. How many times were you actually in his sister's house, upstairs in the apartment; on how many occasions? How many times. A. I believe that same Sunday I called him down. He was up there a little too long. He
1061 said he would be down in five minutes and I walked up half an hour later and he was chewing the rag with his girl.

Q. Did you actually go into the apartment? A. Yes, sir.

Q. On Sunday? A. Yes, sir.

The Court: Proceed

By Mr. Solovei:

Q. And you say he was talking to his girl? A. Yes, sir.

1062 Q. Is that the young lady he later on married? A. No, the girl's name is Jean.

Q. Not the same girl that he is married to? A. No.

Q. You told us something about the Parole Board, that he was worrying about the Parole Board you said, is that right? A. That is right, not the Parole Board, the parole officer.

Q. The parole officer? A. That is right.

Q. Do you know that the next day was on a Sunday and there is no parole officers around on

Sunday, don't you? A. They are around all the time.

Q. You know that from your experience? A. I know that.

Q. What time was it that you met him on Sunday? You have not given us the time. What time was it that you met him on Sunday? A. About, I would say about ten o'clock.

Q. In the morning? A. (No answer.)

Q. Do not shake your head. A. Yes.

Q. And where was it you met him at ten 1064
o'clock in the morning? A. Right up in my own flat.

Q. At your house? A. That is right.

Q. On Sunday morning? A. Yes, sir.

Q. You were alone there that morning? A. My wife and child.

Q. Your wife and child were there that morning? A. Yes.

Q. He left you, according to your testimony on direct examination at four o'clock in the morning at Essex and Delancey? A. Yes, sir.

Q. And he went home? A. Yes, sir. 1065

Q. And he got up and met you the next morning at ten o'clock? A. Yes, sir.

Q. Did you have it prearranged to meet him at ten o'clock in the morning? A. Yes.

Q. He was to meet you at ten o'clock at your house? A. Yes, sir.

Q. And did he again repeat to you everything that happened, at ten o'clock, or was there some other conversation? A. There was other conversation.

Q. Nothing at all about this case now? A. It was not about the case.

Q. I say, there was not a word said on Sunday morning about this case, is that right? A. About the case?

Q. Yes. A. There was conversation about the case.

Q. A minute ago you said there was nothing said about the case. Now which is it? A. There was a lot said all Sunday.

Q. That was not in your house? A. Not in my house.

1067 Q. You mean after you left your house, there was some more conversation about it? A. About who took part in the thing and like that.

Q. And he again repeated to you everything that transpired on the evening of February 15, 1941, is that right? A. He did not.

Q. He did not repeat everything? A. Not everything.

Q. But he went over many details of the crime, is that right? A. Yes, like bringing out the way the cop laid there, that he says, no dog, he pegged it out with him.

1068 Q. He told you all about that? A. Yes, sir.

Q. Now you told us, I think you said something about Rudish, did you say brought back the license plates, is that right? A. That is right; that is what he told me.

Q. That is what he told you; that Rudish brought back the license plates, is that right? A. Yes, sir.

Q. And I assume the license plates from the car that did the job? A. Not from the car that did the job. That was the extra set of plates, to put them on the hot ones.

Q. That is the extra set of plates that you put on the hot ones? A. Yes.

By the Court:

Q. What does "hot ones" mean? A. Like somebody keep their cars in open lots and you walk in there and take the plates; if you want to go out and do the job, you put the legitimate plates on it.

Q. What do you mean by "legitimate"? A. 1070
Once a car is laid up in one of them kind of places the fellow don't use the car most of the time so they take them plates off and put them on the car that was stolen. That is the way they cannot trace you.

By Mr. Solovei:

Q. You have done that on many occasions, haven't you, Yes or no? A. No.

Q. You never did that? A. No.

Q. Of course if it became necessary to do such a thing, you would not hesitate to do it, would 1071
you? A. What is that?

Q. I say, if it became necessary for you to do that in order to make a getaway, you would not hesitate in doing that? A. I never did it.

The Court: He means, if you had to do it.

The Witness: No, I wouldn't do it.

Q. You would not do it? A. No, sir.

Q. You go out and stick up a poolroom with a half a dozen people in it, and you would not

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put on an extra pair of plates? A. I would not take a pair of plates from somebody else.

Q. You would not stoop so low as to take a pair of plates? A. Not that I would not stoop.

The Court: Please do not try to outshout the witness.

The Witness: He can holler; that is all right.

1073 The Court: Please do not outshout the witness. Let us get an answer, because a question without an answer is meaningless.

Mr. Solovei: That is right.

The Court: Give your answer. Mr. Solovei asked you if you would not stoop so low as to take plates. Answer that question.

The Witness: I never took plates.

The Court: What he wants to know is if you would do it if it became necessary.

The Witness: Yes.

1074

By Mr. Solovei:

Q. You told us a little while ago that when you do a job, you want to do a clean job to make sure that you can get away, didn't you? A. That is right.

Q. And by a job, of course you understand I mean a holdup or a stickup or whatever crime may be necessary when you are out, is that right? A. I didn't get everything you said.

Q. I say you understand what I mean when I say a job, I do not mean a legitimate job;

I mean a job that you sometimes go out on for a holdup or a stickup? A. That is right.

Q. Well, you now say that the plates that you talked about were not plates that were on the car, but that they were a separate pair of plates; is that right? A. That is right.

Q. And you also told us on your direct examination that they got something like $220 apiece, but Malinski said he got an extra double sawbuck, to use your exact language? A. Yes, that is right. 1076

Q. Meaning an extra $20? A. That is right.

Q. You did not get any part of it, did you? A. Not a quarter.

Q. I want to get this one thing cleared up here; that talking to Lawrence in the Sing Sing Prison, you said that was the first man you ever spoke to in your life about what you testified to here today, is that correct? A. I didn't tell him everything.

Q. I said, that is the first man you spoke to about this case in your life until you came here today, other than what you said? A. You mean after I was in prison already? 1077

Q. Yes. A. After I was confined.

Q. Yes. A. After I was confined, yes.

Q. Before your talking to Lawrence, you never said a word about this case at all, is that correct? A. I believe I mentioned it to one other fellow.

Q. Well, now, who is this other man you spoke to other than Lawrence about this case, and when? A. At Sing Sing Prison.

Q. What is his name? A. Sam Kovner.

Q. Kovner? A. Kovner, I guess it is.

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Q. And what sentence did he get up there? A. I think he got 15 to 30.

By the Court:

Q. Do you know the name of the Judge that gave him the sentence? A. I believe it was Mr. Brancato.

By Mr. Solovei:

1079 Q. Who gave the other fellow the sentence, Lawrence? A. Mr. Brancato.

By the Court:

Q. Are you sure it was not Judge Leibowitz that gave him the sentence? A. I am not sure.

By Mr. Solovei:

Q. Were Kovner and Kurt together when you told them about this case? A. No, sir.

1080 Q. Well, how did you come to talk to Lawrence or Kovner about it? A. Kovner used to eat with me at the same table.

Q. And you became very friendly? A. Yes.

Q. Did you talk to him about it before you spoke to Lawrence? A. I spoke to Lawrence first.

Q. Well, would you say that that conversation was had around the summer of 1942? A. December?

Q. The summer of 1942. A. No, about three months after I was up there; around March, I guess.

Q. You said you spoke to him about six months after you got up to Sing Sing? Didn't you tell us that? A. Yes, about that.

Q. Now you were sentenced on December 12th, 1941, is that right? A. That is right.

Q. So that if you spoke to Lawrence six months after that, it would be around May of 1942, is that right? A. No.

Q. May or June? A. I wasn't there long when I spoke to the kid; I wasn't there long in Sing Sing. 1082

Q. How soon after you spoke to Lawrence or Kovner did you come down here to New York? A. After I spoke to Lawrence, I guess about seven months later; I guess; I am not sure.

Q. That would make you coming down to New York around, would you say it was around November or December of 1942? A. I came down October 20th or 18th; around that time.

Q. October? A. October 18th or 19th; I don't remember the exact date.

Q. You remember the month? A. October.

Q. October 1942? A. Yes. 1083

Q. And when you came down from Sing Sing, did Yellin come down with you? A. No, sir.

Q. Were you the first man to be brought down from Sing Sing or was it Yellin? A. I was.

Q. And when you came down from Sing Sing in 1942 did you go to the District Attorney's office? A. I did not.

Q. How were you brought down, by automobile? A. Yes.

Q. Who brought you down? A. Mr. Heffernan.

Q. Who? A. Mr. Heffernan.

Q. Heffernan? A. Yes.

1084 Q. The Assistant District Attorney? A. Yes. I don't know if he is an Assistant District Attorney. I think he is an investigator.

Q. He is a heavy-set fellow? A. The man that was sitting in the box.

Q. That is an Assistant District Attorney? A. Yes.

Q. And who else? A. Lieutenant McNally.

Q. Yes? A. I believe Bill Casey. That is about all.

1085 Q. And what time was it that you left Sing Sing in that automobile when you came to Brooklyn? A. I left in the afternoon.

Q. And what time did you arrive in Brooklyn, if you know? A. Say about three hours later.

Q. I mean, did you go right to the Hotel Bossert? A. Yes, that is right.

Q. And did you have your dinner there that night? A. Yes.

Q. Did you remain there that night? A. I did not.

1086 Q. Before October 1942 somebody from the District Attorney's office or the Police Department spoke to you about this case while you were up in Sing Sing, isn't that correct? A. That is correct.

Q. And when they came up to talk to you about this case, you told them that you didn't know anything about the case, isn't that right? A. I didn't say that.

By the Court:

Q. What did you say? A. I says I ain't go-

ing to hurt anybody. I ain't going up to testify against anybody.

By Mr. Solovei:

Q. You told them you don't know anything about it? A. I said I don't want to know anything about it. I said, "I am doing 30 to 60; leave me alone."

Q. Didn't you say you don't know anything about the case? A. I never said that.

1088

Q. Did you make a statement to anybody up there then? A. Never made a statement.

Q. Did they examine you up there? A. Examine me?

Q. Yes.

The Court: Use language that he will understand.

Q. When I say "examine", did they ask you questions up there? A. They did.

Q. Who asked you questions up in Sing Sing? A. Mr. Heffernan and Lieutenant McNally. 1089

Q. And when was that? A. I guess it was about two weeks before they brought me down.

Q. And would you say it would be around September of 1942, or in October 1942, the early part? A. I think it was still October, if I am not mistaken.

Q. And they came up there and you were in the Warden's office, were you? A. I was not.

Q. Or some private room? A. That is right; I was in the visiting room.

Q. How long were they talking to you? A.

Not long the first time because I had nothing to say.

Q. Was Yellin there, too? A. He was not.

Q. Do you know whether they spoke to Yellin at that time? A. As far as I know, no.

Q. So that as I understand the first time Mr. Heffernan and Lieutenant McNally spoke to you, you said nothing at all about this case, is that right? A. I just listened. I just sat there and listened.

1091 Q. You sat there and listened, is that it? A. Yes, sir.

Q. You said nothing about the case, is that right? A. Not at that time; I don't remember saying anything.

Q. Then you were brought down to the Hotel Bossert by Mr. Heffernan and somebody of the other officers, around the latter part of October 1942, is that right? A. No.

Q. What? A. No.

Q. You were not brought down? A. Not then.

Q. What? A. The first time they come up and see me, they went away. Then Lieutenant

1092 McNally come back himself, I imagine about a couple of days later, I think it was two or three days later and called me out again and he started throwing a lot of questions at me, showing me what he knew about the case. He says, "I will take you down and I will talk to you. If you don't want to say anything, you will come right back," so I says, "If you want to take a gamble and take me down, go ahead," I told him.

Q. He started in throwing questions at you and you were scared that he might stick you

into this murder, you and Yellin? A. I was not afraid of nothing.

Q. You didn't think he had anything like that in mind? A. I know he didn't.

Q. So it came a time that he took you down to Brooklyn, the latter part of October, 1942, is that correct? A. That is about the date, around October.

Q. It was towards the end of October, wasn't it? A. I don't remember exactly. I know it was in October. 1094

Q. While you were in the automobile with Heffernan, Assistant District Attorney Heffernan and Lieutenant McNally and one or two other officers that you mentioned, did you talk to them in the car? A. I didn't talk to anybody in the front of the car. They had the window closed. I only spoke to McNally.

Q. Were you sitting in the front? A. In the back.

Q. With McNally? A. And Mr. Heffernan.

Q. And while you were in the car, riding with Mr. Heffernan and Lieutenant McNally, did they ask you about the case then? A. They did not. 1095

Q. Not a word of conversation about the case? A. No conversation I can remember.

Q. For two and a half hours, riding from Sing Sing to Brooklyn, neither Assistant District Attorney Heffernan or Lieutenant McNally asked you anything about the Fox murder case, is that right? A. That is about it.

Q. Now I take it the first time you ever spoke to Mr. Heffernan about the Fox murder case was at the Hotel Bossert, is that correct? A. That is right.

Q. So that when you were at the Hotel Bossert, you sat down and spoke to Mr. Heffernan, is that right? A. To him and Mr. McNally.

Q. Were you seated at a table? A. I was sitting on a couch.

Q. And while sitting on the couch talking to Mr. Heffernan, you told him the story as you know it, is that right? A. I still didn't tell him nothing.

Q. What? A. I still didn't tell him nothing then.

Q. You didn't tell him nothing at that time? A. No.

Q. Well, did you finally go out to dinner? A. I ate up there.

Q. After dinner, did you talk to them? A. Yes, I talked to him.

Q. And was it after dinner that you told him all about this case? A. No.

Q. Was it the same day that you were brought down that you told him all about this case? A. I don't believe so.

Q. You finally left the Hotel Bossert and went somewheres, didn't you, with the detectives? A. To Jail.

Q. What Jail did they take you to? A. I think it was 161st Street.

Q. 161st Street? A. Yes.

Q That is the Jail that you are presently incarcerated in? A. Yes.

Q. Is that correct? A. Yes.

Q. While going up to the Jail, did you go with Lieutenant McNally? A. Up to the Jail?

Q. Yes. A. Yes.

Q. And did he talk to you on the way up? A. He did.

Q. And you still said you knew nothing about the case? A. I didn't say I don't know anything.

Q. You didn't tell him anything about the case, is that right? A. I didn't tell him anything.

Q. On the following day, did they bring you back to Brooklyn again? A. The following day?

Q Yes. A. I think the following day they took me to Raymond Street. I think so; I am not sure. 1100

Q. Well, from Raymond Street did they bring you back to the Hotel Bossert? A. Yes.

Q. What time did you get to the Hotel Bossert for the second time? A. In the afternoon; some time.

Q. And did you see Assistant District Attorney Heffernan there? A. I did.

Q. And Lieutenant McNally and some other detectives there? A. Yes.

Q. And the detectives all spoke to you? A. I didn't speak to all of them. The only one I spoke to is McNally. 1101

Q. Didn't Detective Bell talk to you? A. Bell?

Q. Yes. A. Yes, I spoke to Bell, too.

Q. Didn't Detective Salarno talk to you? A. Not at the time.

Q. What? A. Not that time.

Q. Did he talk to you around that time? A. After they arrested Malinski.

Q. Not before that? A. Not that I can remember.

Q. You came down from Sing Sing according to the record that I have in my hand, October 14, 1942, is that correct? A. October 14th?

1102 Q. Yes. A. It could be about that time.

Q. And October 15, 1942, you went before the Grand Jury, didn't you? A. I never went in front of no Grand Jury.

Q. You never appeared before the Grand Jury?

The Court: He said so; go ahead.

The Witness: That is right.

The Court: Please, Mr. Solovei, pro-

1103 ceed.

Mr. Solovei: All right.

The Court: Let us try to save some time by not repeating the answers in the next question.

By Mr. Solovei:

Q. Well, you were brought down to Brooklyn again on October 15, 1942, is that correct? A. What was that?

Q. You were brought back to Brooklyn here on October 15, 1942, and you remained in Brook-

1104 lyn from 11:30 a. m. until 10:30 p. m., is that right? A. I don't know what you mean.

Q. You say you went up to the 161st Street Jail when you were brought down from Sing Sing, is that right? A. That is right.

Q. And that was around, according to the records here, October 14, 1942? A. About that.

Q. Now October 15th, you were here in Brooklyn from 11:30 a. m. to 10:30 p. m., is that right? A. October 15th?

Q. Yes. A. From what time?

Q. From 11:30 a. m. in the morning until

10:30 p. m., is that correct? A. I don't know. I don't know the exact hours I was out.

Q. Well, were you being examined and questioned from 11:30 a. m. until 10:30 p. m.? A. Questioned?

Q. Yes.

The Court: Does that indicate when he left the Jail at 161st Street in the Bronx, at 11:30?

Mr Solovei: Let the Judge see that. 1106

The Court: I do not want to see that. It will take some time to get back to 161st Street from Brooklyn. Does that indicate when he left the Jail and came back?

Mr. Solovei: What I can gather is when he left and returned. I suppose that probably an hour is for traveling either way.

The Court: All right.

Q. Now can you tell us, Mr. Spielfogel, when it was that you first made the statement to anybody at all from the District Attorney's office? 1107 Can you give us the date? A. The way I figured, it should be about a couple of days before Malinski was arrested.

Q. Well, now, I will refresh your recollection from what I have. Malinski was arrested on the 23rd day of October. I think he was arrested on October 23, 1942. Do you understand that? You say you made your statement a few days before he was arrested, is

that right? A. I imagine it was a couple of days.

Q. What? A. A couple of days before.

Q. Now would you say that you made your statement around the 18th, or 19th or 20th, either one of those days, to give you plenty of leeway? A. I don't remember.

Q. What? A. I don't remember what day it was.

Q. You left the 161st Street Jail on a number of occasions when you did not return at all back to the Jail, isn't that right? A. That was for official business.

Q. You had official business? A. I was taken up to certain places up-State.

Q. Up-State? A. That is right.

Q. And you went out on official business? A. That is right.

Q. How many times did you go out on official business that you did not return back to the 161st Street Jail? A. I returned.

Q. Not the same day, the next day you returned, is that right? A. I was out all day.

Q. What? A. I was out all day.

Q. All day and night, and you came back the next evening? A. I slept in 161st Street. That is the only place I slept. When I went out of there, I did not sleep out of there.

Q. On November 6, 1942, you left the 161st Street Jail and you did not return until 2:30 a. m. the next day. Were you out on official business then? A. (No answer.)

Q. Were you out on official business then? A. All I know I was up-State one day.

Q. Up-State? A. Yes.

Q. While you were at the Jail, did you visit your family? A. Visit my family?

Q. Yes. A. To see my wife, yes.

Q. You visited your wife? A. Yes.

Q. Where did you visit your wife? A. At my house. My wife and son.

Q. And how many times did you do that? A. About two or three times.

Q. And how many hours did you spend with your wife? A. Hours? I say minutes; about fifteen minutes maybe each time. The only thing 1112
is Mr. McGough let me go home and see my son. He was sick. I asked him for permission and he gave me the permission, and he let a couple of detectives go with me.

Q. You were also at the Bellevue Hospital? A. I was.

By The Court:

Q. Is that where your child was? A. No, he was home sick.

Q. What brought you to Bellevue Hospital? A. I was sick. 1113

Q. You were sick? A. Yes.

The Court: Proceed.

By Mr. Solovei:

Q. You made several trips to the Bellevue Hospital, didn't you? A. I was sick; upset.

Q. Do you know how many trips you made to the District Attorney's office? A. Oh, a lot of times.

Q. What? A. Quite a number of times.

1114 Q. Now you actually made a statement to Assistant District Attorney Heffernan sometime in October, 1942, is that right? A. A statement?

Q. You did not? A. No. All I remember is—

Q. Did you make a statement?

The Court: The word "statement" may not be intelligible to this witness. Use language that he will understand.

1115 Q. Well, did there come a time in October 1942 when you told Assistant District Attorney Heffernan what you knew about this case? A. I didn't tell Heffernan; I told McNally.

Q. Was Assistant District Attorney Heffernan present? A. I think so.

Q. And was a stenographer present? A. Not that I remember.

Q. Did somebody take down what you said? A. No, sir.

Q. At any time? A. No, sir.

Q. You told them everything that you testified to here, is that right? A. Not everything.

1116 Q. Well, did you withhold something from them? A. (No answer.)

Q. Did you withhold something from them? A. Yes.

Q. Didn't you at that time determine that you were going to tell the truth and tell everything you knew about the case? A. No.

Q. You did not? A. No.

Q. You still wanted to withhold something from them even then when you decided to tell the truth? A. Yes.

Q. You were told, weren't you, by the police

officers, that in order for you to get any help or assistance at all, they want you to tell the truth and tell them everything that you know about the case? Didn't they tell you that? A. What do you mean by help?

Q. Well, I mean some help for yourself. A. Not me. I was never promised anything.

Q. You got 30 to 60 years and you do not expect any help or assistance from anybody, is that right? A. That is right.

Q. You just all of a sudden are coming here 1118
to tell everything you know about this case, is that right? A. That is right.

Q. And you have no ill-feeling against Malinski, have you? A. Ill-feeling? I don't know what you call it.

Q. What do you call it? A. Just want to tell the truth and get it over with.

Q. You and Malinski have been on the outs for some time, haven't you, Slip? A. No.

Q. You accused Malinski of taking your wife out, didn't you? A. I never did.

Q. Didn't you accuse him of that? A. Never. 1119

Q. Didn't you know that your wife went up to see Malinski? Didn't you know that your wife went up to see Malinski's sister and say if she does not get $500 that she will see that he goes to jail? Don't you know that?

The Court: You are assuming that that happened and you are asking him if he knows about it.

Mr. Solovei: I will withdraw that.

The Court: That is a very unfair question.

1120 Q. Did you know that your wife went to Malinski's house, or his sister's house?

Mr. McGough: What is her name?

Q. To Mrs. Daniels' house and said that she wants $500 from them otherwise she is going to make trouble or see that trouble is made?

By The Court:

1121 Q. Were you told any such thing as that? A. Something like that; but not exactly what he said.

By Mr. Solovei:

Q. Something like that but not exactly? A. She told me she was over there.

Q. And she told you she asked for $500, didn't she? A. She did not.

Q. Did she tell you whether she asked for any money or not? A. She did not.

1122 Q. Do you know when she said she was there? A. She told me she was there a couple of times; a few times.

Q. Do you know now whether or not you ever made a statement—

The Court: I will let you pursue it to your heart's content, Mr. Solovei. I will let you pursue it further, if you desire. Do you want to show any motive on the part of this witness?

Mr. Solovei: Yes.

The Court: You may go the limit on it.

By Mr. Solovei:

Q. Now, Slip, you did, did you not, on a number of occasions accuse Malinski of having intimate relations with your wife, didn't you? A. I never accused him of any such thing.

Q. Did you suspect him? A. Suspect him? Never.

Q. Did you send your wife to Malinski's family home? A. I never sent her.

Q. When she visited you at the Jail, she told 1124
you that she went to Mrs. Daniels', Malinski's sister's home, didn't she? A. She did.

Q. And she told you that she made several visits there, isn't that right? A. A couple of times.

Q. Did she tell you she tried to get some money from Malinski's family? A. Not from Malinski's family but from Malinski. He sent her some money.

Q. She told you she tried to get some money from Malinski? A. He did send her some money.

Q. He did send her some money? A. Yes.

Q. How much money did he send her? A. I 1125
guess it was about $3 every two weeks.

Q. And that was while you were in Jail? A. That is right.

Q. And then Malinski stopped sending her money, isn't that right? A. That is right.

Q. And she came to you and told you that Malinski stopped sending her money, isn't that right? A. That is right.

Q. And then she said she went to Malinski's sister's house to try to get some money, is that

correct? A. She went to Malinski's sister's house but she spoke to Malinski himself.

Q. And she tried to get some money out of him there again, is that right? A. She asked him for money.

Q. And Malinski turned her down, didn't he, at that time? A. He did.

Q. And then she made several other trips and Malinski again turned her down, isn't that right? A. Not that I can remember. She didn't
1127 make any more trips after that.

Q. You were a little bit sore over the fact that your friend Malinski turned your wife down for a few dollars every week? A. If I saved your life a couple of times I would say that.

Q. You were sore, weren't you? Won't you answer the question? A. A little.

Q. And you thought, that Malinski being your pal, and friend, that he ought to help maintain and support your family with a little bit anyhow, isn't that right? A. Yes, that is what we had made up between us if anyone of us got
1128 pinched.

Q. And then it was after that that you got sore, that you refused—that you came down and made this statement against him, is that right? A. I didn't make no statement.

Q. I say, but it was after Malinski refused to further support or help to support and maintain your family, or give your wife some money, it was then some time in October of 1942 that you came down and told Assistant District Attorney Heffernan or Lieutenant McNally, all about

this case, isn't that right? A. I didn't tell them all about it, I am telling you.

By the Court:

Q. At first you refused to say anything? A. That is right.

Mr. Solovei: May I ask the District Attorney, through your Honor, whether or not there is a written statement by this witness? 1130

The Court: Yes.

Mr. McGough: I will be glad to make a statement for the record.

The Court: Mr. McGough, what do you wish to say?

Mr. McGough: There is no "Question and Answer" statement of this man at all.

The Court: There is no stenographic statement?

Mr. McGough: No stenographic record. There are some memorandums that 1131 were given to me and I have them here.

The Court: But no "Q and A" statement?

Mr. McGough: No "Question and Answer" form at all. If I had them, I would be glad to turn them over, as your Honor knows.

Mr. Solovei: May I, in addition to what I asked, your Honor, is there any stenographic record or typewritten record taken down by a Police stenographer or

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by the Police Department, which was turned over to the District Attorney?

The Court: Is there any stenographic or typewritten statement?

Mr. McGough: I have subpoenaed every Police record and I find none.

The Court: Proceed.

By Mr. Solovei:

1133 Q. Slip, do you remember when you took Malinski to your house for the purpose of asking your wife whether or not he had intimate relations with her, and then there was some trouble and you hit your wife in the eye and gave her a black eye? Do you remember that day?

The Court: Now you see, Mr. Solovei—

The Witness: No such thing ever happened.

The Court: Please do not ask questions in that form. I know you do not do it intentionally.

1134 Mr. Solovei: I do not.

The Court: When you ask a man if he remembers whether he did so-and-so, you are assuming he did; just like asking a man, "Do you remember beating your wife," and he says "No". That means that he beat his wife but he does not remember the day. Ask him if he did that.

By Mr. Solovei:

Q. Didn't you bring Malinski to your house for

the purpose of satisfying yourself that he never had relations with your wife, and that he and she denied it; that you hit her in the eye and gave her a black eye? A. That is a lie.

Q. Nothing like that happened? A. Never.

Q. And do you remember meeting Malinski coming out of one of the barber shops in the City of New York—

Mr. McGough: Objection.

Mr. Solovei: I withdraw it. 1136

The Court: Proceed.

By Mr. Solovei:

Q. Isn't it a fact that you and Yellin— A. What?

Q. Isn't it a fact that you and Yellin had guns with you one day and you said to Malinski, "We have got a good mind to kill you because you have had Spielfogel's wife"—meaning your wife? A. That is a lie.

Q. Nothing like that happened? A. No.

Q. Do you know a street or are you familiar 1137 with a house at 325 East 101st Street, New York City? A. Familiar with a house?

Q. Is there any house around there that you are familiar with at 305 East 101st Street where a man by the name of Jim lives? A. Jim?

Q. Yes. A. 101st Street?

Q. I withdraw that. Do you know a man by the name of Jim, of the Yorklen Club, at 305 East 101st Street? A. I don't know.

Q. Do you know the house? A. No.

Q. Do you know the club? A. No, I don't know it.

Q. Do you know a Joseph Cardinall? Do you know that name, Cardinall? A. Cardinall?

Q. Yes, Joseph Cardinall. A. I don't know him.

Q. Cardinale? A. Cardinale? No.

Q. Well, this fellow Kovner that you spoke about, you knew him before you went up to Sing Sing, didn't you? A. I never spoke to him before I went.

Q. You knew him? A. I never spoke to him.
1139 I knew him to see him.

Q. I said, you knew him, didn't you? A. Yes, I knew him; sure.

Q. You knew him from around the East Side? A. From the East Side, yes.

Q. He was a friend of Beitler's, wasn't he? A. A good friend.

Q. A good friend of Beitler's? A. Yes.

Q. You were up in Elmira, weren't you? A. Yes.

Q. And while up in Elmira, you were placed in the Psychiatric Ward? Do you know what I
1140 mean by that? A. The Bug Ward.

Q. Yes. A. I was up there out of population but what I called it like, I asked the Warden up there why I was put in there. I was only a short time when I was put in there.

Q. You were in the what you call the Bug Ward, weren't you? A. Well—

Q. Weren't you? A. That is what they call it, I guess.

Q. And you were there for some time, weren't you? A. I guess I was there about seven or eight months.

Q. Seven or eight months? A. That is what I figured.

Q. And you were being treated there by the doctors, weren't you? A. No, never treated.

Q. You were in there with the rest of the bugs, is that right? A. I didn't see no bugs there.

By The Court:

Q. Were you in any Bug Ward up in Sing Sing, where you are now? A. Not me. 1142

By Mr. Solovei:

Q. You are all right now? A. I always was.

Q. You were also examined in New York by Dr. John H. Cassidy, weren't you? A. Cassidy? I don't know him.

Q. A doctor examined you that examines "Bugs". I mean crazy people.

By the Court:

Q. Isn't there a doctor that examines every prisoner in General Sessions before they sentence them? A. Yes. 1143

Q. Every prisoner, before he is sentenced, is examined? A. By a psychiatrist.

Q. By a psychiatrist? A. That is right.

The Court: Is that Dr. Cassidy that you have reference to?

Mr. Solovei: I suppose it is.

The Court: Every defendant is examined. They do not do that here in Brooklyn, although they should. Over in Man-

144 hattan, they have a regular psychiatric bureau. Every prisoner, no matter what the crime is, goes through that process of being examined and a report is given to the Judge. That is common knowledge, Mr. Solovei.

Mr. Solovei: I think that is right.

The Court: All of us know that.

By Mr. Solovei:

145 Q. Slip, you made certain statements to the doctor when you were being examined? Do you remember that? A. Yes.

Q. And you lied to the doctor, didn't you? A. Lied?

Q. About the statements that you made to him? You didn't tell him the truth? A. I guess not.

Q. You guess not? A. That is right.

Q. Now coming down to the time when you were at the Hotel St. George, you say you overheard—

146

Mr. McGough: The St. George?

Q. The Hotel Bossert, and you overheard Malinski make some sort of a statement; is that right? A. That is right.

Q. Now do you know when that was, the date? A. I imagine it was about two weeks after I was down.

Q. Two weeks after you were down? A. Yes.

Q. How many police officers were at the Hotel

Bossert when Malinski was being questioned by the police? A. How many?

Q. Yes. A. I imagine about four or five.

Q. Lieutenant McNally was there? A. Yes, sir.

Q. Detective Bell was there? A. Yes, sir.

Q. Detective Salarno was there? A. Yes, sir.

Q. Detective McNally was there? A. Yes, sir.

Q. Detective Low was there? A. I don't know if he was there.

Q. Is that right? A. I think he was; I don't 1148
know.

Q. Was Detective Anderson there? A. No, sir.

Q. Now we will say at least five detectives were there, is that right, at least five? A. About four or five.

Q. And you were there while Malinski was there in the morning, is that right? A. Not in the morning.

Q. On the day he was being questioned? A. It must have been in the afternoon.

Q. I mean, before that, weren't you there in 1149
the morning? A. Before that?

Q. Yes. You remember the morning of October 23, 1942, when you were at the Hotel Bossert in the morning of that day? Do you remember that?

The Court: He said he was not there in the morning. Ask him if he was there in the morning.

Q. Were you there on October 23, 1942? A. Is that the date Malinski was arrested?

Q. Yes. A. I was there in the afternoon about two o'clock.

Q. Weren't you there in the morning? A. I was not.

Q. You were transferred on the 19th day of October, 1942, to the Fifth District Prison, is that correct? A. That is correct.

Q. What? A. That is correct.

Q. The day Malinski was arrested, were you at the Hotel Bossert? A. The day he was arrested?

Q. Yes. A. That is when I was brought out of the 121st Street Prison.

Q. You were in one of the private rooms at the Hotel Bossert and Malinski was in another room, is that right? A. I was in the same room with him.

Q. But there were many times that you were in a separate room, wasn't there, in the morning? A. I was in the same room with him.

Q. Weren't you brought in later on into the same room? A. What do you mean?

Q. First you were alone in a separate room and then later on you were brought into a room where Malinski was? A. When I come up from the 121st Street Jail, I was brought right in front of him.

Q. When you were up there, when you were brought into the same room, Detective McNally or other detectives told you, did they not, that Malinski said that he had nothing at all to do with this crime? Didn't they tell you that? A. They didn't say that but they says, "Wait until you come in front of him and let him say what he said before."

Q. You mean let Malinski say what he said before? A. Yes.

Q. Well, they told you that Malinski before that said that he had nothing to do with the crime, is that correct? A. Something like that.

Q. Detective McNally and the other detectives told you that they had questioned Malinski and Malinski said that he did not have anything to do with the Fox murder? Isn't that what they said? A. (No answer.)

Q. Is that what they said? A. They said it 1154
will only take a couple of hours before he will get smart.

Q. What? A. It will only take a couple of hours before he will get smart.

Q. The cops said it will only take a couple of hours? A. While riding down from the Jail.

Q. I asked you a question; didn't the cops tell you, and the police officers that were there that day at the Hotel Bossert, didn't they say to you they were questioning Malinski at length and he said he had nothing to do with the Fox murder? Didn't they say that to you? A. No, 1155
they did not. They didn't say that.

Q. Did they say words to that effect? A. All they said, they asked him a few questions.

Q. And he said he knows nothing about it? A. The questions they asked him about the money.

By the Court:

Q. Yes? A. And he said all the change that was taken from the Patrolman Fox holdup he said I—the only thing he knows I gave him all the change.

1156 By Mr. Solovei:

Q. You gave him? A. Yes; so they wanted him to say it in front of me.

Q. In other words, he said you were the person that gave him the change, is that right? A. Yes, that is what he said.

Q. They asked him whether or not he assisted in the Fox murder, didn't they, before that? A. I don't believe they did.

1157 Q. You don't believe they did? A. No.

The Court: That is all hearsay, isn't it? How does he know what they asked him; things that they asked him about not in his presence. If you want the hearsay, I will let you ask him.

Mr. Solovei: I am asking him if the detectives did not tell him that.

The Court: Put the question clearly.

By Mr. Solovei:

1158 Q. Didn't the detectives tell you when you arrived at the Hotel Bossert, that they spoke to Malinski and they asked Malinski whether he knew something about the Fox murder, and Malinski said he knew nothing about it? Didn't they tell you he said that? A. No.

Q. What time was it that you got to the Hotel Bossert? A. I would say about 1:30.

Q. And how was Malinski dressed when you got there? A. He was sitting there in his shorts.

Q. He was in his underwear, wasn't he? A. He had a blanket over him.

Q. What? A. He had a blanket wrapped around him.

Q. He had a blanket around him? A. Yes.

Q. Malinski told you that they were giving him a workout, didn't he? A. He never said that.

Q. You know what a workout means? A. Sure I do.

Q. Tell the jury what a workout means. A. A workout means to me when they give you a beating. They beat you. 1160

Q. When you saw Malinski there, he just had his undershirt on and his BVD pants, is that right? A. Yes.

Q. His coat was off; his shirt was off and his pants were off? A. Yes, sir.

Q. And that was at one o'clock in the afternoon? A. Yes.

Q. Is that right? A. That is right.

Q. And then didn't one of the detectives, I don't care which one, didn't one of the detectives say to Malinski in your presence, "Now let us see how long you are going to keep this up. I will put you in one room with Spielfogel, 1161 and what you done to Spielfogel's wife, he will knock your brains out"; didn't they say that to him? A. They never said no such thing.

Q. Well, was Assistant District Attorney Heffernan there? A. I don't think so. I don't think he was there.

Q. Did he get there about three o'clock; two or three o'clock? A. I think he come up there after he was dressed; after he had his clothes on. I am not sure.

Q. After who was dressed? A. Malinski.

Q. Who told Malinski to get dressed? A.

1162 From what I understand, they wanted to see if he had any bullet holes.

The Court: Not from what you understand; tell us what you know.

By Mr. Solovei:

Q. Who told Malinski to get dressed when you were there?

1163 The Court: If you know.

The Witness: The detective.

By Mr. Solovei:

Q. What? A. The Lieutenant.

Q. Did he get dressed? A. He did.

Q. Was he dressed when Assistant District Attorney Heffernan came there? A. Yes, sir.

Q. What? A. Yes, he was dressed.

Q. And were you there when you heard the Assistant District Attorney question Malinski?

1164 A. I don't know if he was an Assistant District Attorney that was questioning him. I think it was McNally.

Q. McNally? A. Yes.

Q. Well, wasn't the Assistant District Attorney present when McNally was questioning him? A. I don't know. I don't remember whether he was or not.

Q. Well, did you remain in the room all the time where Malinski was? A. Yes.

Q. And did you hear them questioning him while you were in the room? A. Yes.

Q. And the questions came from McNally or some other cop, continuously, is that correct? A. I think it was from—you mean when he told all that happened?

Q. I mean at three o'clock in the afternoon, two or three o'clock in the afternoon, while you were there. A. The only one I believe he talked to was McNally.

Q. And did you hear Malinski say to McNally at two or three o'clock in the afternoon that he did not commit the crime or know anything 1166
about the Fox murder?

Mr. McGough: That is objected to. That has been asked three times. Twice it has been answered in the negative.

The Court: Let him ask it again. Did Malinski say anything of that kind in your presence?

The Witness: Did he make a statement?

The Court: That he did not know anything about the Fox case.

The Witness: I didn't hear him say 1167
that.

By Mr. Solovei:

Q. They questioned Malinski from the time you came there, in any event, up to at least 10 o'clock that night, before Malinski said that he knew something about the Fox murder, isn't that correct? A. He told them about five o'clock everything.

Q. Five o'clock? A. That night; in the afternoon.

Q. Or was it later than that? A. It could not have been later. It was right before supper time.

Q. So from the time you came there until about half past five that evening he still maintained his innocence, is that correct? A. That is right.

By the Court:

Q. He said he did not know anything about the Fox murder; that he was not involved in it? Is that what you mean to say? A. He said he was not there.

Q. Had nothing to do with it? A. Yes.

Q. Is that right? A. That is right.

By Mr. Solovei:

Q. Now there came a time while you were at the Hotel Bossert with Malinski, where the two of you were placed in a private room, wasn't there? A. Yes, not a private room. He asked, Malinski, if he could speak to me.

Q. A separate room, wasn't it? A. It was not a room. It was a closet.

Q. Was it a toilet, a wash room? A. One of them big closets.

Q. Just an ordinary clothes closet? A. Yes, that is right.

Q. And you and he had a private talk, didn't you? A. About two minutes.

Q. And he said to you, "Slip, what are they trying to do, frame me here", and you said, "Moish, don't worry. If you didn't commit the crime, you have nothing to worry about". Isn't

that part of the conversation that took place there? A. Do you mean what took place?

The Court: No, tell us what took place there.

Q. I am asking you whether or not—

The Court: Did what Mr. Solovei asked you about take place there in the closet?

Mr. McGough: Yes or no. 1172

The Court: Is it the way Mr. Solovei put it?

The Witness: He said, what took place in the closet?

Mr. McGough: Repeat the question. Listen carefully.

The Court: Repeat the question to him.

(The question was repeated by the stenographer as follows: "Q. And he said to you, 'Slip, what are they trying to do, frame me here', and you said, 'Moish, 1173 don't worry. If you didn't commit the crime, you have nothing to worry about.' Isn't that part of the conversation that took place there?")

The Witness: No.

The Court: What was said there in the closet?

The Witness: He said, "Slip, I know they got Jake in another room and he is telling them everything he knows so I might as well put the finishing touch to it

and get it over with. They know too much."

By Mr. Solovei:

Q. Is that the whole conversation you give us now, all of that that was said? A. No.

Mr. Carabba: I ask that that be stricken out as to the defendant Rudish.

The Court: Yes, the jury will disregard it as to the defendant Rudish. Have you anything more, Mr. Solovei?

Mr. Solovei: Yes, I have a few more questions.

The Court: I am not going to limit you to any extent. Counsel will not be limited in his cross-examination.

Mr. Solovei: May I ask your Honor, that if you are going to stop now, to see that this witness is held incommunicado during further examination. It is no more than fair.

The Court: The Court directs that the witness is not to be interviewed by anybody connected with this case.

Mr. McGough: He has got to go back with the same two policemen.

The Court: Not to be interviewed by anyone, and I mean by anyone. That means no one. The Police Officers are directed and instructed by order of the Court not to talk to this witness about this case or any of its aspects under any

circumstances. A violation of that order would be held to be contempt of court.

Mr. McGough: That does not mean that I have to send him up to 161st Street alone?

The Court: That does not. The Officers can talk to him when they go back. He can talk to the Officers and he can talk to anybody at all.

Mr. McGough: Not about the case.

The Court: But not about this case 1178
while he is under cross-examination.

Gentlemen of the jury, it is now six o'clock and we are about to take a recess until tomorrow morning at ten o'clock. Again I am required by the law to admonish you not to discuss the case among yourselves or with any other person; not to permit anyone to speak to you about this case or refer to it in your presence. Again I admonish you to keep your minds open and do not form or express any opinion or conclusion as to the guilt 1179
or innocence of the defendants on trial, or either of them or any of them, until the case is finally submitted to you for your consideration after a charge on the law by the Court. You may retire, gentlemen.

(The jury retires from the courtroom.)

The Court: The defendants are remanded.

(Recess until 10 a. m., June 17, 1943.)

Brooklyn, N. Y., June 17, 1943, 10 a. m.

AFTER RECESS. TRIAL RESUMED.

NATHAN SPIELFOGEL, recalled for cross-examination, having been previously duly sworn, testified as follows:

Cross-examination by Mr. Solovei:

Q. Now, Slip, you made about 60 visits to the District Attorney's office in Brooklyn, is that correct? A. I did.

Mr. Solovei: At this time, I offer in evidence the record produced here pursuant to subpoena duces tecum, from the Department of Corrections, of one Nathan Spielfogel, who was incarcerated at the 161st Street prison.

The Court: Mark it for identification.

(Marked Defendant's Exhibit B for identification.)

Mr. Solovei: May I have an exception to your Honor's refusing—

The Court: Is there any objection to this document?

Mr. McGough: Yes; it is immaterial. I object to it.

The Court: Sustained.

Mr. Solovei: Exception.

The Court: Do you claim there is anything in the document that contradicts

what he said? Just answer that question yes or no.

Mr. Solovei: It is not for that purpose.

The Court: I am asking you, is that the reason?

Mr. Solovei: I cannot answer—

The Court: Is that the reason why you are offering it, to show contradictions on the part of the witness? Just answer that, yes or no. 1184

Mr. Solovei: Cannot answer it because I am not using it for that purpose.

The Court: All right; objection sustained.

Mr. Solovei: Exception.

The Court: If you desire to offer the document to show a contradiction on the part of the witness, want to contradict him, impeach his credibility; that is another matter.

Mr. Solovei: I am using it to attack his credibility; yes. 1185

The Court: That is not what you said.

Mr. Solovei: You asked me about contradictions.

The Court: That is attacking credibility; contradictions bear on credibility. But if you merely want to clutter up the record with a lot of papers, I am going to sustain the objection.

Mr. Solovei: I respectfully except to your Honor's statement, and I except to your Honor's refusing to permit me to offer it in evidence. I will tell your Honor

1186 *Nathan Spielfogel—For People—Cross*

at the bench, if you want me to, why I want to offer this in evidence.

The Court: Sustained. It is marked for identification, so that the record is protected.

By Mr. Solovei:

Q. I think you told us, you gave us two names yesterday, Curt Lawrence and Kovner. Are
1187 those the names that you want to stick to that you spoke to at Sing Sing? A. I did not have a deep conversation with Kovner about the case.

Q. Did not have a deep conversation? A. No.

Q. Did you have a deep conversation with Curt Lawrence? A. Not very.

Q. Do you want to stand by those two names as the two persons you spoke to at Sing Sing? A. That is right.

Q. What? A. That is right.

Q. Is the name Curt Lawrence? A. That is right.

Q. Or is it Sam Kablonski? A. It was not
1188 Kablonski.

Q. Do you know Kablonski? A. I do not.

Q. He was up in Sing Sing while you were up there? A. He was up in Sing Sing, but I don't know him to speak to.

Q. You know Sam Kovner very well? A. I know Sam Kovner.

Q. How long have you known Sam Kovner? A. I will say about eight years, I guess.

Q. How long have you known Curt Lawrence? A. About a year and a half now.

Q. You mean since you are up there? A. About.

Q. And before you came up there, did you know him? A. Before I came up, no.

Q. You knew Kovner before you came up there but you did not know Lawrence? A. I knew Kovner but not to talk to.

Q. You know—what is his name—Kovner—and Sam Kablonski, were very friendly with Beitler, don't you? A. I know that now.

Q. Didn't you know it then? A. What do you 1190
mean? When I went to Sing Sing?

Q. No; before that; before Sing Sing? A. No; I did not know that.

Q. As a matter of fact, Sam Kovner and Sam Kablonski were in the same hotel that Beitler was at the time he shot and killed himself; is that right? A. That is right.

Q. And at the time that happened you were in the Tombs Prison, isn't that correct, awaiting sentence? A. That is correct.

Q. Did they visit you while you were in the Tombs Prison, Kovner or Kablonski? A. No, 1191
sir.

Q. When somebody spoke to you asking you whether or not you wanted to go on this job, you said, I think, on your direct examination—if I am wrong correct me—that you went with Malinski to hide the guns; is that right? A. No—say that again, please.

Q. Do you want me to repeat it? A. Please.

Mr. Solovei: Will the stenographer read it, please.

(Read)

A. Not for that particular job.

1192

The Court: I don't understand what that means. Do you care to pursue it any further, Mr. Solovei?

Mr. Solovei: I am going to ask another question, Judge.

The Court: All right.

By Mr. Solovei:

Q. Did the police tell you at any time that you could be brought in as an accomplice in this case, Slip? A. I don't remember them saying that.

1193

Q. Don't remember them saying that? A. No.

Q. Was there some talk about it by some of the police officers at any time during the conversation with you that they may bring you in as an accomplice in this case? Do you remember that? A. I don't remember.

By the Court:

Q. No; was that said? A. I never heard it said.

1194

By Mr. Solovei:

Q. Well, was it said by any assistant district attorney to you? A. Not that I can remember.

Q. And you said after they came back and you saw guns, after they came back, the same guns you say were used for the purposes of committing this crime?

Mr. McGough: I object to that unless he specifies "Came back from where".

1195

Q. On the morning of February 16th, or, we will call it the night of February 15th, 1941—

By the Court:

Q. Did you actually see the guns? A. That were used?

Q. Listen to the question. Mr. Solovei asked if you actually saw the guns that were used on the Fox killing, after the killing? A. After the killing, no.

1196

By Mr. Solovei:

Q. Did you see Beitler? A. After the killing?

Q. Yes. A. No; not that night.

Q. You saw Beitler a number of times after February 15th, 1941, isn't that right? A. Yes; but I did not see him that night.

Q. You saw him a number of times after February 15th, 1941, isn't that correct? A. Yes; a few times.

Q. You and Beitler were very friendly, isn't that right? A. Very friendly, yes.

1197

Q. You had gone out on jobs with Beitler before, stickup jobs? A. Never.

Q. Did you visit Beitler at the 51st Street Hotel when he lived up there? A. Never.

Q. Did you visit him at his home? A. No; I did not.

Q. Where did you meet Beitler the times when you did meet him? A. Where did I meet him? I met him on Houston, between Avenue A, and I don't know the other block. I think it is Norfolk or Suffolk—a candy store.

1198 Q. Is that a hangout for you? A. It is his aunt's candy store.

Q. Did you hang out there often? A. I just came over there and talked a few times.

The Court: In line with the question that you asked, I want to be clear as to what the witness claims.

By the Court:

1199 Q. Yesterday and this morning you spoke about hiding guns? A. That is right.

Q. This morning you told Mr. Solovei that the hiding of these guns had nothing to do with this Fox matter? A. At that time when I put them away?

Q. When you put them away it had nothing to do with this matter? A. At that time? I did not know.

Q. Was it for some other matter?

Mr. Solovei: I object.

1200 Q. Just yes or no.

Mr. Solovei: I object to the question.
The Court: Do you?
Mr. Solovei: Yes.
The Court: Objection overruled.

By the Court:

Q. Was that in connection with some other matter? A. That is right.

Mr. Solovei: In view of your Honor's question and the answer, I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: The question was prompted by counsel. The motion is denied.

Mr. Solovei: Exception.

By Mr. Solovei:

Q. When you left the courtroom here yesterday you walked along Boerum Street, you and Yellin; is that right? A. I don't know what street it is. 1202

Q. Right outside here, from here to whereever you went? A. Outside, yes.

Q. Where did you go from here? A. From here? I think we went to a restaurant.

Q. To have something to eat? A. Yes.

Q. And were either you or Yellin handcuffed to anybody? A. Handcuffed?

Q. Yes. A. Nobody.

Q. Walking through the streets with the detectives without being handcuffed; is that right? A That is right. 1203

Q. Where did you go from the restaurant? A. From the restaurant we went for the car to go back to the jail.

Q. Went back to 161st Street jail? A. Yes.

Q. Neither you nor Yellin was handcuffed then? A. No.

Q. Isn't it a fact that you were told by somebody that you were going to get some consideration, that you do not have to worry; that everything will be all right, as far as you are con-

cerned; that your sentence will be lessened somewhat; isn't that so? A. No, sir.

Q. During these 60 visits that you made, or about that many, at the District Attorney's office, did you ever meet your wife at the District Attorney's office? A. Yes.

Q. Did you ever meet other members of your family at the District Attorney's office? A. No, sir.

Q. Was your child at the District Attorney's
1205 office with your wife? A. No, sir.

Q. While you were at the District Attorney's office with your wife, were you sitting around in some room there with your wife? A. Yes; in front of four detectives.

Q. You were sitting in a room? A. In the detectives room.

Q. You were sitting in a room? A. That is right.

Q. You were there talking to your wife? A. That is right.

Q. You spent hours and hours with her at
1206 times, didn't you? A. Maybe a couple of hours.

Q. Did this thing happen every visit that you made to Brooklyn, to the District Attorney's office? A. No, sir.

Q. While you were at the District Attorney's office, did you meet Yellin there? A. I did.

Q. You and Yellin were in one room? A. Yes, sir.

Q. And while you and Yellin were in the room neither one of you were handcuffed? A. We were not handcuffed.

Q. Did you see Yellin's family there too, at the District Attorney's office? A. I did not.

Q. Never any member of his family? A. I think I seen his wife once up there. I am not sure.

Q. Was he married at that time? A. I don't believe he is.

Q. Why do you say you saw his wife, if you know he is not married? A. That is what I call her.

Q. You call her his wife? A. Yes.

Q. Did he live with this woman in New York as husband and wife? 1208

Mr. McGough: Objection.

The Court: Sustained.

Mr. Solovei: Exception.

By Mr. Solovei:

Q. How many times did you see this lady that you call his wife, at the District Attorney's office, with Yellin, while he was down talking to the District Attorney? A. There was only once that I could remember.

Q. See his mother there? A. Never. 1209

Q. Sister? A. Never.

Q. Did you see his sister there? A. No.

Q. Were any of the members of your family there other than your wife? A. No, sir.

Q. You and Yellin occupy the same cell at 161st Street jail? A. Now?

Q. Yes. A. No, sir.

Q. You see each other every day? A. Yes, sir.

Q. How long do you know this man Tiplet—did you call him Tiplet—Red—what is his right name? Will you give me that? A. Red Tiplet.

Q. Tiplet, is that the way you pronounce it? A. Red Tiplet.

Q. How long do you know him? A. About five years.

Q. Did you meet him on the East Side? A. I did.

Q. Did you ever go out with him? A. Never.

Q. When you met him on the East Side, did you meet him in this candy store that you are talking about? A. I met him in the candy store
1211 and I met him at the club. He was a member of the club.

Q. Member of your club? A. Not my club; the Citadel Club.

Q. Are you a member of the Citadel Club? A. I am not.

Q. Is the Citadel Club a hang-out for thieves and murderers? A. It is not a hang-out; there is a lot of legitimate people enter it too.

Q. Would you call yourself legitimate? A. No, sir.

Q. Call Yellin legitimate? A. No, sir.

Q. Call Tiplet legitimate? A. Yes, sir.

1212 Q. How often did you see Tiplet at the club? A. A number of times.

Q. Did you, at some time that you saw him, did you eat with him? A. Eat with him? No, I never ate with him.

Q. Did you go out and have some drinks with him? A. No.

Q. Did you visit him at his home? A. At his home? No.

Q. Do you know where he lived at that time? A. I did not.

Q. Did he live on the East Side? A. I know

he lived on the East Side, but I don't know where.

Q. Did you know what business he was in at the time you knew him from the East Side? A. I don't believe he was working at the time.

Q. Used to see him very often then, didn't you—you were not working, were you?

The Court: There are two questions there.

Mr. Solovei: All right. I will withdraw it. I will withdraw those questions, Judge. 1214

Q. Did you see Beitler at the Citadel Club? A. I did.

Q. How often did you see Beitler at the Citadel Club? A. He came up there a couple of times.

Q. Beitler legitimate? A. No, sir.

By the Court:

Q. Beitler was a gun man, wasn't he? A. That is right. 1215

Q. The same as you? A. That is right.

By Mr. Solovei:

Q. Now, did you go there specially to meet Red Tippler at the Citadel Club at times? A. Specially?

Q. Yes. A. No, sir.

Q. Did you see this Red Tippler at any other club that you visited? A. No.

Q. Slip, on the day that you say you were

1216 present when Malinski made some statement at the Hotel Bossert, can you tell us what time of the morning you left?

The Court: We have been over that half a dozen times.

Mr. Solovei: I don't think I asked him that question.

The Court: Proceed to some other question. There must be a limit to this.

1217 Mr. Solovei: I did not ask him that question. I am sure of it.

The Court: You did. Ask the question for the final time again.

By Mr. Solove.:

Q. What time did you leave the Hotel Bossert? A. I don't remember.

Q. Was it in the early hours of the morning? A. I don't remember.

Q. And do you remember that while Malinski was being asked some questions and he did not

1218 remember some answers, that you volunteered some of the answers? You remember that?

The Court: Now the question is bad as to form.

Mr. Solovei: All right; I will reframe it.

The Court: I asked you yesterday not to put questions of that kind.

Mr. Solovei: I don't do it intentionally.

The Court: I know you do not.

By Mr. Solovei:

Q. Isn't it a fact that you volunteered answers to certain questions that were propounded to Malinski? A. No.

Q. Who is Nat Math? A. I think he is a District Attorney; I am not sure.

Q. Did you ever meet him? A. I don't believe I did.

Q. Would you know him if you saw him? A. Maybe if I seen him, I don't know; if I seen 1220
him I probably would know him, if I know him or not.

Q. Didn't you at some time or another say to Malinski, "You rat you, I will get even on you for what you have been doing with my wife"; didn't you say that? A. No, sir.

Q. Do you like Malinski? A. One time I did.

Q. You don't like him now, do you? Yes or no. A. No.

How long have you known Levine? A. Levine; since about 1938.

Q. Friend of yours? A. Which Levine do you 1221
mean?

Q. How many Levines do you know? A. I know a couple of them.

Q. Which Levine did you think I am talking about?

Mr. McGough: Objection.

The Court: Come on now, let us get down to it. Tell him what Levine you have in mind. Let us carry this case along with some degree of progress. Proceed, please.

By Mr. Solovei:

Q. You spoke about a Levine here yesterday, didn't you? A. Yes.

Q. What is that Levine's first name? A. Harry Levine.

Q. Harry Levine? A. Harry Levine.

Q. Do you know where he lived at that time before you went away? A. I don't know where he lived, but I know it is out in Brooklyn.

1223 Q. Did you ever visit him? A. Yes.

Q. At his home? A. No.

Q. Did he ever come to your house? A. No, sir.

Q. Did you go out with him? A. No, sir.

Q. Was he in your company often? A. Often? No.

Mr. Solovei: I think that is all as far as I am concerned.

Cross-examination by Mr. Carabba:

1224 Q. Mr. Spielfogel, is it? A. Spielfogel.

Q. Do you remember the first time that you mentioned Mr. Rudish's name in this case? A. First time? Yes.

Q. When was that? A. In this case?

Q. I am talking about this case, yes, sir. A. The first time was a Friday.

Q. Friday when? A. Before the holdup.

Q. Before the case opened? A. What do you mean, the first time I ever spoke to him?

Q. No, no. When did you for the first time mention the name of the defendant Rudish in

the Fox case and to whom? A. First time was to Mr. McGough.

Q. I said, when. Can you give us the month, the year?

By the Court:

Q. Do you understand what the question is? A. I don't know what he means.

Q. Here is what Mr. Carabba means: You made some statement about Rudish being involved in the case, is that it? A. Yes. 1226

The Court: Is that what you had in mind?

Mr. Carabba: That is right, Judge Leibowitz.

By the Court:

Q. After the killing of Fox you told somebody that Rudish was mixed up in this case, is that right? A. Somebody in the office?

Q. No, indeed. Mr. Carabba is not limiting you to District Attorneys or policemen. To anybody. What he wants to know, if I understand Mr. Carabba's question— 1227

Mr. Carabba: That is right.

The Court: You will pardon me for explaining it in plain English.

Q. What the lawyer wants to know is this: When was the first time that you ever mentioned Rudish's being connected with the Fox case, after it happened? A. First time—

Q. And to whom, whether it was to a prisoner or to a policeman? A. To a prisoner.

Q. Or to a District Attorney only; and to whom did you mention it for the first time? A. To a prisoner.

Q. Mr. Carabba wants to know when that was? A. I don't remember the date.

Q. When? A. I know it was in Sing Sing but I don't know when.

1229 By Mr. Carabba:

Q. Who is the prisoner? A. Kurt Lawrence.

Q. He was the first person to whom you spoke about Rudish, is that correct? Are you sure about that? A. Yes.

Q. You remember when you were brought down here and you were asked to testify before the Grand Jury? A. I never went in front of the Grand Jury.

Q. I see you did not go before the Grand Jury? A. That is right.

Q. Didn't you at that time say that Rudish
1230 had never anything to do with the Fox case? A. I did not.

Q. Didn't you tell some of the police officers that Rudish had nothing to do with the Fox case at that time? A. No, sir.

Q. Weren't you told by the police officers that unless you brought Rudish in the picture you could not go before the Grand Jury? A. What was that, sir?

(Question read.)

A. I did not say that.

Q. You were present when Rudish was arrested at the police station at Bath Beach? A. That is right.

Q. Did you at that time, while you were in the police station and Rudish was there, did you at that time say to the police that Rudish was involved? A. They already knew it.

Q. What? A. They knew it.

Q. I didn't ask you that. Did you say at that time to the police, in the presence of Rudish that Rudish was involved in the Fox case? A. 1232
In the presence of Rudish? No.

Q. Didn't you say then and there at that station house—I am talking about the Bath Beach incident—that Rudish was not involved in the Fox case? A. I did not.

Q. You never mentioned his name, did you, to the police at that time? Yes or no. A. That time?

Q. What? A. I did not say anything that time.

Q. You know you did not say anything about Rudish at that time in the station house? A. 1233
That is right.

Q. And you were asked, were you not, by the police whether or not Rudish was in the Fox case? A. I was asked; sure I was asked.

Q. Didn't you say that Rudish was not involved in the Fox case, at the station house at Bath Beach? A. I said he was there—not at that time —before that.

Q. I am not talking about any conversation you had with a prisoner by the name of Kurt Lawrence. I am talking now of the incident at the Bath Beach station house when you were

confronted with Rudish. You remember that incident? A. That is right.

Q. Didn't the detective there ask you in the presence of Rudish whether or not Rudish had anything to do with the Fox case, and you said, "No"? A. I never was brought in front of him in the station house.

Q. You were there when he was being questioned, isn't that correct? A. In a different room.

The Court: Same room you mean?
Mr. Carabba: Same room.

A. I was not.

Q. Wasn't there a time that you were brought in the same room where Rudish was, by the detectives? A. Not in the station house.

Q. Was it at the Hotel Bossert? A. They just brought me in front of him, that is all.

Q. Was it at the Hotel Bossert; yes or no? A. What was the question.

Q. That you were brought in front of Mr. Rudish? A. I was.

Q. And was it on that occasion that you told the police, the detectives, that Rudish did not have anything to do with the Fox case at that time? A. What I did say I don't know—

Q. Please answer the question. At that time didn't you say that Rudish had nothing to do with the Fox case, at the Hotel Bossert at that time? A. I did not.

Q. What did you say at that time?

Mr. McGough: I object to that.

Mr. Carabba: In the presence of Rudish.

Mr. McGough: Objection.

The Court: Objection overruled.

Mr. McGough: May we have the time fixed if possible?

The Court: He fixes it as the Hotel Bossert.

Mr. McGough: He was down there a lot. I would like to have the date fixed or I am going to object to it. 1238

Mr. Carabba: All right; fix the date. I have no objection.

Mr. McGough: I object to the question unless the date that he wants the conversation this particular witness had, is fixed, if they are able to fix it.

Q. Shortly after Mr. Rudish was arrested, October 24, 1942—

By the Court:

Q. Do you understand? Mr. Carabba wants to know what you said in the presence of Rudish? A. I was brought in and taken out again, that is all That is all I remember. 1239

By Mr. Carabba:

Q. Weren't there questions? A. Not that I can remember.

Q. Put to Rudish in your presence? A. Yes, yes.

Q. And you heard Rudish say in your presence—

1240 Mr. McGough: Objection.

The Court: Is there any objection to what Rudish said?

Mr. McGough: I misunderstood, Judge. I thought he was talking again about what if anything this man said.

The Court: Mr. Carabba is now asking for what Rudish said.

Mr. McGough: I certainly object to anything Rudish said. It is self-serving.

1241 The Court: That is sustained.

By Mr. Carabba:

Q. Well, you remember being asked by the detectives in the presence of the defendant Rudish: "Do you know anything about this man?" referring to Rudish? A. They did not say that.

Q. What did they say? Tell the jury. A. They just brought me in front of him and asked me if I knew this fellow. I says I did. They asked him the same thing. That is all I can remember. After that they took me right out.

1242 After that they took me right out.

Q. Didn't they ask you at that time and place whether Rudish had anything to do with the Fox case—speaking about the Hotel Bossert, October 24th, 1942? A. I don't remember.

Q. Do you remember a detective saying to you in the presence of the defendant Rudish, "Well, you still want to do your thirty to sixty?" A. They never told me.

Q. Nobody told you that? Who was the detective that brought you into the room where Ru-

dish was on that occasion? A. I believe it was Lieutenant McNally.

Q. When did you for the first time talk to Beitler about this job at Coney Island? A. About three days before, three or four days before the Fox case.

Q. Three or four days before February 15, 1941, is that correct? A. About that. I don't know it to be correct. It is about that time.

Q. You know the shooting of Fox took place on February 14, 1941? A. 15th. 1244

Q. February 15th. I stand corrected. And you fix the time three or four days prior to February 15, 1941; is that correct? A. About that.

Q. Were you present when Yellin introduced, as you say, Rudish to Malinski? A. I was.

Q. And when was that? What time do you fix that that took place? A. That was around my birthday, in August.

Q. Around your birthday? A. In August of 1940.

Q. 1940? A. Yes.

Q. The witness Yellin said it was in the month of October. Would that refresh your recollection? A. No. 1245

Q. Well, you knew then, did you not, that there was a job, as you call it, a robbery at Coney Island, to take place; you knew that, didn't you? A. Then?

Q. Yes. A. No.

Q. When did you know it for the first time? A. For the first time when Yellin told me.

Q. When Yellin told you, and what time do you fix when Yellin told you that? A. About

1246 three or four days before it happened. About three days before it happened.

Q. You were asked by Yellin whether you wanted to go on this robbery? A. He explained it all to me what took place.

Q. You were asked by Yellin whether or not you wanted to go on this stickup at Coney Island? Yes or no. A. No.

Q. You say Yellin explained to you the stick-up that they were going to pull off at Coney
1247 Island? A. No.

Q. What did you mean? A. What I meant, he told me what happened—what Ebbie told him, Ebbie and Tiger—he delivered the message to me.

Q. Well, Yellin told you what? A. That he met Tiger and Ebbie when he was coming home from work, and they got a soft thing out in Coney Island, and he wants to see me. That is what he told me.

Q. After he saw you what were you supposed to do? A. I was supposed to go and see
1248 Beitler that same day.

Q. You did go to see Beitler? A. I did not.

Q. He called you up, did he not? A. The following day.

Q. And you did see him, didn't you, pursuant to that telephone message? A. I did.

Q. And you knew that Beitler was a gunman, like yourself? A. I did.

Q. Beitler and you talked over this soft thing at Coney Island? A. That is right.

Q. And Beitler asked you if you wanted to go on the job? A. That is correct.

Q. That is correct. And in that conversation

Beitler asked you whether you would furnish him with the "pieces," is that correct? A. That is correct.

Q. And by the "pieces" in answer to Judge Leibowitz's question yesterday, I understood you to say by "pieces" you meant guns, is that correct? A. Yes, sir.

Q. The underworld slang for guns is "pieces", is that correct? A. That is correct.

Q. So that on that occasion, two or three days before February 15th, 1941, Beitler asked 1250
you for the guns, is that correct? A. That is right.

Q. For this Coney Island job, this soft job down in Coney Island? A. Yes,

Q. And your reply to Beitler was that you did not have the "pieces"; is that correct? A. That is correct.

Q. But you knew who had the "pieces", the guns; didn't you? A. That is right.

Q. And you told Beitler where he, Beitler, could get the guns, didn't you, in that conversation? A. He asked me, "Where is Moish now." 1251

Q. He asked you what? A. "Where is Moish?" Meaning Malinski. I told him, "The only place he must be is over at the store where he works." So he said, he is going to go down and see him. That is all.

Q. Then you knew that certain guns were at a store? A. That is right.

Q. And you imparted that information to Beitler, is that correct? A. No; he was under the opinion that they were mine at first, but I made it clear to him. I told him "they ain't mine; they are Malinski's."

Q. You have had certain guns of your own, didn't you, certain "pieces" of your own, you used on jobs? A. I did.

Q. When was it that you had this conversation with Beitler concerning the guns, when you told him they were at the store? Was that on the same day? A. The day that he came down to the candy store first time that he came down.

Q. What day would you fix that was? A. I would say it was around Thursday.

1253 Q. Thursday? A. Yes.

Q. Then you know that there were certain guns at the store? A. I did.

Q. How many guns did you know or "pieces", as you call them were there. A. At the store?

Q. Yes. A. Seven.

Q. How many belonged to you? A. None.

Q. How many belonged to Beitler? A. None.

Q. Whom did all these guns belong to, if you know? A. Mr. Malinski.

Q. All of them? A. Correct.

1254 Mr. Solovei: Of course, as far as I am concerned, on behalf of the defendant Malinski, I must object to it, and move to strike out all the testimony relative to the separate and distinct conversations.

The Court: Sustained.

Mr. Solovei: I do not know how we are going to eradicate this testimony unless you take care of it later.

The Court: I will take care of it in proper shape, and if I don't, why, you call it to my attention, and I am quite sure that I will satisfy all of you. In other

words, the English that will be used will be forthright and clear and understandable so that this jury will not take this case, if it reaches that far, under any misapprehension. The rights of these defendants will be amply protected.

Mr. Carabba: May I proceed, Judge Leibowitz?

The Court: Surely, Mr. Carabba.

1256

By Mr. Carabba:

Q. Now, Mr. Spielfogel, where was this conversation you had with Beitler with reference to the guns? Was it at the candy store? A. Yes.

The Court: Now, Mr. Carabba, it is important for me at this time to understand exactly what the witness claims so that I may be in a position properly to charge on certain phases of the law. You undoubtedly know what I have in mind.

Mr. Carabba: Yes, your Honor. 1257

The Court: I would like to have the testimony clear on this point.

Mr. Carabba: No objection.

The Court: May I?

Mr. Carabba: No objection.

The Court: I do not want to intrude on counsel's province.

Mr. Carabba: None at all.

By the Court:

Q. You say that Beitler asked you for the "pieces"? A. That is right.

Q. You did have "pieces" at that time, didn't you? A. That is right.

Q. You say that you refused to give him your "pieces"? A. That is right.

Q. Now, listen to this carefully that I am about to put to you. Take your time in answering it. When you said, "I will not give you the 'pieces' or "I won't give you my 'pieces'" or words to that effect, who was the next person that spoke, you or Beitler? A. You see, I did not—

1259 Q. No, no; just pause for a minute. If you want to think about it, I will let you do that. Who was the next person that spoke after you said to Beitler, "I am not going to give you my 'pieces'" or "you cannot use my 'pieces'" or words to that effect? Did you speak or did Beitler speak? Did you say something or did Beitler say something then? A. Beitler did.

Q. What was it Beitler said? A. He said, "Where is Moish?"

Q. Yes. A. I said, "The only place I know he might be over at the store where he works." He said, "I am going to go down to see him."

1260 Q. Yes. A. Then he left—

Q. Is that all that was said at that time? A. That is all.

Q. Did you send him to Moish? Did you tell him to go to see Moish to get "pieces" of Moish, or did Beitler say, "Where is Moish?" A. Beitler said, "Where is Moish?"

The Court: Go ahead.

By Mr. Carabba:

Q. Didn't you say a moment ago that you told

Beitler that he could get the "pieces" at Moish's store? Didn't you say that? A. I don't remember saying that.

Q. You knew that there were guns at Moish's store, isn't that correct? Is that your story? A. That is right.

Q. Didn't you on that occasion, when Beitler spoke to you and asked you for your "pieces", you said you would not let him have yours; is that correct? A. He did not ask me for mine.

Q. He asked you for "pieces", for guns? A. 1262
Guns, yes.

Q. And you told him where he could get them, down in the store, didn't you, on that occasion? A. I did not say that he could get them out of the store.

Q. You knew they were at the store? A. That is right.

Q. You told Beitler that guns were at the store at that time? A. I did not.

Q. Didn't you tell Beitler to get in touch with Moish, or at the store he could get the "pieces"? A. I did not.

Q. What did you say? A. I says he will have 1263
to talk to Moish, that is the only way he can get them "pieces". "There is no part of mine there," I said. He was under the opinion that they were mine, that I was part owner of them.

Q. That you would have to talk to Moish to get the "pieces", to give the "pieces" to Beitler? A. He will have to talk—Beitler—if he gets them all right. I have got no part of the "pieces".

Q. Didn't you say you would have to talk to

1264 Moish so that Moish would give Beitler the guns; is that correct? A. Yes.

Q. Did you talk to Moish—

The Court: Well, now—I want to be absolutely fair.

Mr. Carabba: I understand the point, Judge.

The Court: I have to charge this jury.

1265 Mr. Carabba: I understand, Judge.

The Court: You know the point that is involved?

Mr. Carabba: No objections, your Honor.

The Court: I am not going to lead this witness, at all.

Mr. Carabba: I know your Honor won't.

By the Court:

1266 Q. Now, go back again, and be very careful about what you answer. By that I mean, I want you to understand the question. I want you to understand what you are saying. There came a time when Beitler came to you and asked you for guns; is that right? A. That is right.

Q. Now, from that point on, I am going to ask you to repeat the conversation step by step without my leading you. When Beitler asked you for the guns, or for guns, what was it you said to Beitler?

The Court: Do you gentlemen object to what the Court is doing?

Mr. Geoghan: On behalf of Indovino, I do not.

The Court: I want you to feel free to object.

Mr. Solovei: My objection, you have on record, on this line of testimony.

The Court: You mean in so far as it may bind Malinski?

Mr. Solovei: Yes.

The Court: I hold it does not bind Malinski in the slightest degree. The 1268
jury is instructed to disregard the testimony as far as it may refer to Malinski. Is that instruction satisfactory?

Mr. Solovei: The only difficulty is, of course, the jury is getting this damaging testimony as far as Malinski is concerned.

The Court: That is sometimes true in cases where several defendants are being tried together; but the Court's instruction is clear on that point. I will make it again and again.

By the Court: 1269

Q. Now, when Beitler asked you for "pieces", tell me exactly what you said to him. Speak slowly and speak loud. A. I says, "Those 'pieces' don't belong to me" I told him, "Malinski—it is up to Malinski. If he wants to give you them, they are yours. I got no part of them 'pieces'; they are all Malinski's."

Q. I am a little ahead. Go back again. When Beitler asked you for the "pieces" what was it

you said? A. "None of them 'pieces' belong to me."

Q. None of which "pieces" belong to you? A. That Malinski got over at the store.

Q. Who mentioned Malinski? Did you or did Beitler? A. Beitler.

Q. Now go back again. Beitler came to you and asked you for "pieces", is that right? A. That is right.

Q. Just tell us what Beitler said when he
1271 asked you for the "pieces"? How did he ask you? A. "As long as you are not going, is it all right to use the 'pieces'? He has got all big ones".

Q. Who has all big ones? A. He figured me and Malinski.

Q. Let us have that again? A. "As long as you are not going, how is it all right to use the 'pieces' "?

Q. Yes. A. I said, "those 'pieces' don't belong to me. They are all Malinski's 'pieces'. If he gives them to you, you got them."

Q. Is that exactly what was said? A. That is
1272 right.

(The last answer was re-read at the request of the Court.)

Q. Is that exactly what was said? A. Yes, sir.

The Court: All right, proceed.

By Mr. Carabba:

Q. Isn't it a fact that you told Beitler where

the "pieces" were when he asked you for them? A. No, sir.

Q. Didn't you tell Beitler where they were?

Mr. McGough: Objected to.

The Court: Objection sustained.

Mr. Carabba: Exception.

Q. You knew when Beitler asked you for guns, didn't you, that Beitler was going in on this Coney Island job, this Coney Island holdup; you knew that, didn't you? 1274

Mr. McGough: Objection, may it please the Court.

The Court: That is overruled.

By the Court:

Q. In other words, you knew what he wanted the guns for? A. Yes.

By Mr. Carabba:

1275

Q. You knew it is the Coney Island stickup, didn't you? A. Yes.

Q. You knew that a day before he asked you for the "pieces", or the same day that he asked you for the guns? A. Same day?

Q. Is that right? A. Same day; yes.

Q. And you knew that when he asked you for the guns they were to be used for the Coney Island job, didn't you? A. That is right.

Q. And you knew where the guns were, didn't you? A. I knew; sure I did.

Q. Didn't you say to Beitler that you would

1276 *Nathan Spielfogel—For People—Cross*

talk to Moish for those guns, to get those guns for Beitler? A. I told him he would have to talk to Moish, they are his "pieces".

Q. Didn't you say to Beitler that you would talk to Moish for the "pieces"? A. I never said that.

Q. You did say to Beitler that Moish had the guns; that is correct, isn't it?

Mr. McGough: That is already cov-
1277 ered.

The Court: Sustained.

Mr. McGough: I object to it.

Mr. Carabba: I think I ought to be given some latitude, Judge Leibowitz, on this score.

The Court: Indeed, you should; but u have been over that several times now.

Mr. Carabba: I take an exception.

The Court: I will let you go over it again a final time. It is a matter of great importance on a proposition of law.

Mr. Carabba: I withdraw it.
1278

The Court: I will let you ask it again if you want.

By Mr. Carabba:

Q. Didn't you say—now listen to the question—say to Beitler, "If Moish gives them to you they are all right with me". A. I did not say them exact words.

Q. What? A. I did not say that.

Q. In words or substance to that effect, they were not yours, you said; that is correct, isn't it? A. That is right.

Q. You said that Moish had them? A. That is right.

Q. And you knew where they were, down at the store, that is correct? You knew where the guns were? A. That is right; I knew where they were.

Q. You told Beitler that if Moish let Beitler have them, that was all right with you; that is correct, too, isn't it? A. No.

Q. What did you say about Moish? A. "If he gives you them, you got them. Otherwise you 1280
won't have them, that is all. They are not mine."

Q. I know that. You told us that. Didn't you say to Beitler that if Moish would let him have the guns it was all right with you. Now think that over.

Mr. McGough: (To the witness) Don't shake your head. Answer, please. (To the Court) Will you instruct him not to shake his head or nod? The stenographer is not getting this on the record.

1281

By the Court:

Q. What was the answer to the last question? Yes or no? A. I don't know what the last question is.

The Court: Read the question.
(Question read.)

A. Yes.

1282 By Mr. Carabba:

Q. Will you tell his Honor, Judge Leibowitz, and the jury, when was it for the first time that you spoke about Rudish in the Fox case? A. In Sing Sing Prison.

Q. District Attorney in Sing Sing? A. No. The first time I ever spoke?

Q. You are referring now to some prisoner, is that correct? A. That is correct.

1283 Q. That you spoke to. But I am asking you now when you for the first time spoke about Rudish being in the Fox case other than to a prisoner at Sing Sing? When was it for the first time that you told the District Attorney or any police officer? A. First time? I guess it was about a week after I was down, I was brought down from Sing Sing.

Q. You were brought down from Sing Sing some time in the month of October, is that correct? A. That is right.

Q. 1942? A. That is right.

1284 Q. Do you know that Rudish was arrested in the month of October, 1942? A. That is right.

Q. And you kept this all to yourself, this conversation with Beitler concerning the guns, which took place in February—February 15th, 1941—and you did not say a word about it until October 19, 1942, for the first time; is that correct?

The Court: You mean to an official?
The Witness: To an official.

Q. Yes. A. That is correct.

Q. You remember, when you were brought

down here by the District Attorney's office, about going in before the Grand Jury? You remember there was some talk about your going before the Grand Jury? A. I don't.

Q. Don't you remember on one occasion you were brought as near as the door of the Grand Jury room, and you were not brought in there? Do you remember that occasion? A. No, sir.

Q. It is a fact that you never testified before the Grand Jury? A. That is right.

Q. Isn't it a fact that your refusal to go 1286
before the Grand Jury was that you did not mention Rudish's name or Malinski's name?

Mr. McGough: Don't answer that. Objection. It presupposes something that did not occur.

(Question read.)

Mr. McGough: There is no evidence of refusal to go before the Grand Jury.

The Court: Sustained.

Mr. Carabba: Exception.

The Court: First ask him if he refused 1287
to go before the Grand Jury.

By Mr. Carabba:

Q. Did you refuse to go before the Grand Jury? A. I was never asked to go in front of the Grand Jury.

Q. Don't you know you were brought down from Sing Sing to testify before the Grand Jury? A. I did not.

Mr. Carabba: May I offer this docu-

1288 ment, which I believe to be the records of the—

The Court: Refer to it by the exhibit for identification number.

Mr. Carabba: It is Defendants' Exhibit B for identification. May I now offer it in evidence, if your Honor pleases, with reference to the second line there, on behalf of the defendant Rudish.

The Court: Objected to?

1289 Mr. McGough: Yes.

The Court: Sustained.

Mr. Carabba: Exception.

By Mr. Carabba:

Q. Isn't it a fact that on October 15, 1942, you were taken from the prison, 161st Street, to go before the Grand Jury of this county?

Mr. McGough: Objection, your Honor. He stated—

The Court: That is overruled

1290

A. What was the question again?

(Question read.)

By the Court:

Q. To your knowledge. A. I remember I was taken over to Raymond Street.

Q. No, no. When you were taken from the jail in the Bronx were you told or did you know that you were taken for the purpose of going before the Grand Jury? A. I did not.

Mr. Carabba: I still press my offer.

The Court: Objection sustained.

Mr. Carabba: Your Honor will grant me an exception.

By Mr. Carabba:

Q. Were you ever, Mr. Spielfogel, in this building on the fourth floor? A. I don't remember.

1292

By the Court:

Q. Prior to your taking the witness-stand here today were you ever in this building? A. This building?

Q. Yes. A. Yes.

By Mr. Carabba:

Q. On the fourth floor? A. I don't know what floor it was on.

Q. Where were you taken? A. I think it is this building. I am not sure if this is the building. 1293

Q. Where were you taken? A. I stood trial in this county.

By the Court:

Q. That is not what Mr. Carabba means. He means in this case, were you taken into this building, during the Fox— A. I don't know whether it was this building or not; I am not sure.

1294

By Mr. Carabba:

Q. Weren't you ever told that the Grand Jury room is on the fourth floor of this building?

Mr. McGough: Objection: The man says he was never asked to go to the Grand Jury and he did not appear before the Grand Jury.

Mr. Carabba: The record does not show that.

1295

The Court: Now, please—now, look—(to the jury): Step out, gentlemen. Don't discuss the case and keep your minds open. We will take a little recess now.

(The jury leaves the room).

Mr. Carabba: Judge Liebowitz, I wish to apologize.

The Court: Mr. Carabba, I have known you for a good many years, and I think you are one of the finest gentlemen that ever came into this court, and one of the most honorable men that ever practiced before this bar.

1296

Mr. Carabba: I wish to apologize.

The Court: Your apology is accepted.

Mr. Carabba: It was spontaneous.

The Court: Were it another type of lawyer who sometimes comes into this court, I would have imposed a very severe penalty upon that lawyer, but I do believe you when you say it was spontaneous.

Mr. Carabba: I mean it.

The Court: Now that the jury is out, I want to explain my ruling to you. The ruling is not arbitrary or capricious. I

kept this record out because what somebody in Bronx County writes in a jail record is not binding on this witness. The fact that some clerk entered on the record "To be taken to the Grand Jury" does not mean that this witness knew that he was to be taken to the Grand Jury. That is not binding on him unless he knew at the time he left that he was to go to the Grand Jury.

Mr. Carabba: I get your Honor's 1298
point.

The Court: But on that record—now that the matter is out in the open—it is of no probative force as far as this witness is concerned. For example, a man is taken out of Raymond Street Jail—an order is sent down to Raymond Street Jail by a Judge, ordering that the prisoner be taken to a certain inquisitorial office. The prisoner may never be told as to the mission; he may be told as to the mission. When this witness testified that he was not 1299
told and he did not know, when he left the Bronx County Jail, that he was to go before the Grand Jury, or that some Judge had sent an order for that purpose, or that the District Attorney had requested him to be taken to Brooklyn for that purpose; the fact that it is on some jail record does not destroy his credibility and it does not negative what he is saying here. That is why I excluded the document.

Mr. Carabba: May I be heard a sec-

ond? I was closely following your Honor's ruling.

The Court: We don't have to pursue it any further.

Mr. Carabba: All right. I was only closely following your Honor's ruling, and where your Honor said, I think, at one stage, that this record could only be offered for the purpose of contradiction and that was all; you see my outburst was spontaneous and that is all I had in mind.

The Court: Along that line, so that counsel may understand my reason for excluding it—

Mr. Carabba: Now I get your point.

The Court: I will tell you why I excluded these records. If this witness had testified that he was not visited by John Doe—

Mr. Carabba: At the prison—

The Court: (Continuing)—I would permit you to offer the records of the prison to show that John Doe did in fact visit him on that day; because that is a statement of fact.

Mr. Carabba: A record.

The Court: Yes; that is an official record that shows that one John Doe did visit him on that day. That would contradict him. That would bear on his credibility. But just being out of there and a notation in a jail record that he was taken out for the purpose of being before the Grand Jury; how does a jail keeper know that he was being taken for that purpose?

Mr. Carabba: Your Honor, from your many years of experience at this bar and on the bench, knows that the District Attorney's letter requested the turning over of this prisoner to a detective, to be brought before the Grand Jury. There is a letter on file.

The Court: That is quite true; but was that information imparted to the witness?

Mr. Carabba: I see your point. I bow to your Honor's ruling. 1304

The Court: If he had said, "Yes, I was told that I was taken before the Grand Jury, I was to go before the Grand Jury," or if you can prove that the information was imparted to him, I will permit you to show that.

Mr. Carabba: All right. Your Honor can see that my exclamation was spontaneous.

The Court: I believe you are absolutely sincere about that, Mr. Carabba, knowing you for the number of years you have practiced before the bar, and considered by this Court to be one of the most reputable attorneys that practice in these courts; I take your word for it that it was spontaneous. Bring back the jury. I might have taken a different action in the case of a different lawyer. 1305

Mr. Solovei: While the jury is out may I have a minute?

The Court: Surely.

Mr. Solovei: This is strictly—I am addressing myself now to that question

of law why I offered these two exhibits in evidence, so that your Honor may, if you like, change your ruling. I offered these two exhibits in evidence in reference to Yellin and Spielfogel, one marked Exhibit B and the other is marked Exhibit A, for the purpose of showing the time that they spent at the District Attorney's office, when they left the 161st Street jail.

The Court: You mean on one occasion or on each occasion?

Mr. Solovei: On all the occasions, on all these visits. It may mean something.

The Court: He has testified unequivocally that he has been to the District Attorney's office on sixty occasions and that he has spent hours upon hours upon hours in the District Attorney's office; and therefore, if that is the reason for offering these records, I sustain the objection.

Mr. Solovei: The hours cannot properly be explained except by these records, I would say to your Honor.

The Court: These records merely show when he left the jail and when he came back and not what happened in the interim. The records do not show, for example, how long it took them to go from the jail down to the District Attorney's office; that is, what the condition of the transportation was, whether there was a delay in the subway; and all these things are immaterial. You cannot get any more out of this witness than what he has testified. There is nothing contradictory in

these statements. I will sustain the objection.

Mr. Solovei: Under the Civil Practice Act, records kept in the regular course of business are admissible. These records are from the Department of Corrections.

The Court: They must be material. The objection is sustained. Suppose you hold the jury for a few minutes and we will take a short breathing spell here.

1310

(After short recess. Trial resumed).

The Court: Gentlemen of the jury, I think it is fair to say at this time that there is no evidence before this jury at this time—there is no evidence of any record before you that Spielfogel was taken from the jail to go before the Grand Jury, with knowledge on his part that he was to go before the Grand Jury. There is no such evidence before you by reason of what Mr. Carabba said. That remark that was made by Mr. Carabba 1311
should not have been made, and that is not evidence in this case at all. The remark made by Mr. Carabba was inadvertently made and was not intended by him to be made, and was not intended by Mr. Carabba to affect you in any shape, form or manner. What I am saying now is not intended as any personal criticism of Mr. Carabba, who is a fine, upstanding member of our bar. Do you want this witness back, Mr. Carabba?

Mr. Carabba: I would like to have him back.

NATHAN SPIELFOGEL, resumes the stand:

Cross-examination by Mr. Carabba continued:

1312 Q. Now, Spielfogel, on the night of this murder, you sav you saw Malinski, is that correct? A. That is correct.

Q. At your home? A. That is correct.

Q. And with him you dressed? A. That is right.

1313 Q. Left your home and you went with him to a club, is that correct? A. That is correct.

Q. And you were approximately about 40 or 45 minutes with him at the club? A. Around that.

Q. The Citadel Club, is that what you call it? A. About that—Citadel Club.

Q. You and he left? A. That is correct.

Q. Thereafter you went where? A. To the Melrose.

Q. Is the Melrose a restaurant, do I understand? A. Yes, sir.

1314 Q. How long did you remain together there? A. About two minutes.

Q. And from there where did you go? A. We took the bus at 10th Street and Avenue C.

Q. Where did you go then? A. To 9th Street and First Avenue.

Q. Well, at 9th Street and First Avenue, is that the location where the guns were? A. No, sir.

Q. What is that location? A. 10th Street and First Avenue.

Q. Did you go to 10th Street and First Avenue? A. I did.

Q. Is that the place where you say Malinski worked? A. Yes. 1315

Q. You went into the place, did you not? A. I did not.

Q. Did you know at that time, you say, that Malinski had the money on his person; is that right? A. Yes, sir—change.

Q. The fruits of this robbery on his person? A. The change.

Q. You knew it was the fruits of this stickup down at Coney Island? A. I did. 1316

Q. You knew that when he came to your house? A. Yes.

Q. You knew that while you were talking to him at the club? A. Yes.

Q. And you knew that up until the time you arrived at the place where you say Malinski put the money away? A. Yes.

Q. What happened to the so-called "pieces", the guns?

By the Court:

Q. Do you know of your own knowledge? A. The way I understand— 1317

The Court: Are you asking for hearsay?

Mr. Carabba: I am asking for his own knowledge.

The Court: Are you asking for hearsay or what he knows himself, of his own knowledge?

Mr. Carabba: That is what I am asking.

By the Court:

Q. Do you know what I mean? A. What he told me?

The Court: Is that what you are asking for?

Mr. Carabba: I am asking what happened to the guns, what he knows happened to the guns.

The Court: He is a lay witness.

Mr. Carabba: I cannot use this underworld language.

The Court: That is not the point.

By the Court:

Q. Do you know what happened to the guns only from what you were told or did you actually see? A. I did not see.

By Mr. Carabba:

Q. Did you ever mention at the Bossert Hotel, to the detectives, that Rudish was involved in this crime? A. Yes.

Q. I am talking about the Bossert? A. Yes.

Q. Was there a stenographer present taking down the answers to the questions that were being put to you at that time? A. No, sir.

Q. Who was the detective that was present? A. I would say it was Lieutenant McNaily.

Q. That was some time in October of 1942, is that correct? A. That is correct.

Q. And that is the first time that you ever

mentioned Rudish's name, isn't it? A. About a week after I came down.

Q. A week after you came down? You mean when you were brought down from Sing Sing Prison, is that correct? A. Yes.

Q. Did you talk to Yellin last night after you left the courtroom? A. Yellin? Yes.

Q. Did you hear the admonishment of Judge Leibowitz before court adjourned yesterday? A. I did.

Q. Notwithstanding that, you talked with 1322
Yellin?

The Court: Now wait.

Mr. McGough: Just a minute.

Mr. Carabba: Let me press this.

The Court: Now wait, Mr. Carabba; let us be fair about this. I gave everybody instructions that they were not to talk about the case. He may have talked to Yellin about the Dodgers-Giant box scores or something of that kind. That is not in violation of my order. First find 1323
out if he talked about the case.

Mr. Carabba: My friend objects before I have an opportunity to press the objection, and the witness now hears what is being said here, and I wanted to follow that up. I say Mr. McGough's objection is untimely at this time—preliminary.

(Mr. Carabba's question read at the request of the Court.)

The Court: I did not tell him that he should not talk to Yellin. I told him nobody was to talk about this case or about any features of the case.

By Mr. Carabba:

Q. Did you talk to Yellin about this case? A. I did not.

Q. Did anybody talk to you about this case yesterday afternoon after you left the Court? A. No, sir.

Q. During this last recess we have had, a few moments ago, did you talk to anybody about this case? A. I did not.

Q. Did anybody talk to you about this case during this recess? A. No, sir.

Mr. Carabba: I think that is all.

Mr. Geoghan: In order that the record may be straight, I want to offer in evidence the records that were brought down from the jail. I make that motion on behalf of Indovino. I think the other two have made it, and they have their exception. May I have an exception as well? I offer it and take an exception.

The Court: Same ruling. You are offering it not for the purpose of contradicting anything?

Mr. Geoghan: No.

The Court: Just offering it.

Mr. Geoghan: Yes. On behalf of Indovino, I have no question to ask this witness.

By Mr. Solovei:

Q. In May of 1941, were you arrested in New York County, and after your arrest, did any

police officers talk to you about the case? A. 1941.

Q. Yes, when you were arrested in your case, in New York? A. No, sir.

Q. At no time? A. Not that I can remember.

Q. When you were at Police Headquarters were you asked questions about the Fox murder? A. I was not.

Q. After you were convicted in New York, did they ask you questions about the Fox murder? A. No, sir. 1328

Q. What? A. No, sir.

Q. By anybody? A. After I was convicted?

Q. Yes. A. The first time was up in the jail. I was up there about eleven months, ten months.

Q. I am asking about after you were convicted in New York. I did not ask you about just today or yesterday? A. Nobody; never.

Q. You were sentenced in December, 1941 to your present sentence, is that correct? A. Yes.

Q. Before you went to Sing Sing, and while you were at the Tombs Prison in New York County, did any police officers talk to you about 1329 the Fox murder? A. At the Tombs Prison?

Q. Yes. A. No, sir.

Q. Did they take you to Headquarters and examine you there? A. No, sir.

Q. Did they take you to any District Attorney's office and examine you about the Fox murder? A. No, sir.

Q. At no time? A. No, sir.

Q. Are you in doubt about it? A. Not since I came down I was never asked.

Q. I am not talking about that now, sir. I

1330 just don't want to confuse you. I am only talking about—

By the Court:

Q. Before you went to Sing Sing, did any policeman or any official ask you about the Fox murder? A. No, sir.

By Mr. Solovei:

1331 Q. Just one more question: Can you tell now— A. What was that?

Q. I didn't finish my question. I will withdraw that question. Did you and Yellin talk about the Fox case while you were in the Tombs Prison awaiting sentence or awaiting trial? A. I never talked to him about it in the Tombs.

Q. You and he never spoke about it at all? A. Not in the Tombs.

Q. When you got to Sing Sing, did you and Yellin discuss the Fox case? A. I did not.

Q. Never discussed it with him at any time
1332 at all, is that correct? A. Sing Sing?

Q. Any time, any place?

The Court: You mean after the killing?

Q. At any time. Of course, it would be after the killing. It could not be before. A. I don't remember ever talking to him?

Q. You don't remember ever talking to him about this case at all? A. No.

Mr. Solovei: That is all.

Redirect examination by Mr. McGough:

Q. Yesterday when one of the lawyers was questioning you—I think it was Mr. Solovei—mention was made of certain days when you left the prison and did not return. Are we to understand that when you left the prison you did not return at all that night? A. I always returned.

Q. Or did you return past midnight of that day? A. Past midnight of that day.

Q. So that there was never a night that you 1334
spent away from the jail a night where you slept somewheres else; is that what you mean? A. There is only one day that I slept in the station house.

Q. With that one exception did you spend all your sleeping time at the 161st Street Jail? A. I did.

Q. Now, when you spoke to Beitler with reference to Malinski and the guns, did you say to Beitler that if Moish would let you have them that it was all right with you?

1335

Mr. Carabba: I object to that.
The Court: Overruled.

Q. Just a minute, let me finish. Or did you tell Beitler, "If Moish lets you have them, then you got them."

Mr. Solovei: I object.
Mr. Carabba: Already answered.
The Court: Overruled.
Mr. Carabba: I object to it on behalf of the defendant Rudish.

Mr. Solovei: I object to it. It is incompetent, irrelevant and immaterial, not binding on the defendant Malinski.

The Court: Sustained on that ground.

Mr. Geoghan: Same motion for Indovino.

The Court: Sustained.

Mr. Carabba: Well, I make the same motion on behalf of the defendant Rudish.

The Court: Well,—

1337 Mr. McGough: This, your Honor, is redirect, brought on, I submit, by questions that were asked by Mr. Carabba, counsel for Jacob Rudish; and I submit it is competent. I think the record is—

Mr. Carabba: I will withdraw that objection.

Mr. McGough: I think the record has two different answers, and I am entitled to find out what the witness's best recollection is.

The Court: The objection is withdrawn.

1338 Mr. Solovei: My objection, of course, stands.

The Court: Whatever he is testifying now is not binding on Malinski.

By Mr. McGough:

Q. Did you tell Beitler that if Moish would let you have them, it was all right with you; or did you tell Beitler that "if Moish lets you have them then you got them." A. "If Moish lets you have them, you got them."

Mr. McGough: That is all.

By the Court:

Q. Is that exactly what you said? A. That is right.

CORPORAL SIMON EISLER, residing at 1846 Pitkin Avenue, Brooklyn, N. Y., called as a witness in behalf of the People, being first duly 1340
sworn, by the clerk, Mr. Jehle, testifies as follows:

Direct examination by Mr. McGough:

Q. Your name is Simon Eisler, is that correct? A. Yes, sir.

Q. You are a Corporal in the United States Army? A. Yes, sir.

Q. Where are you presently stationed or assigned, please. A. Fort Lewis, Washington.

Q. Is that in Tacoma, Washington? A. Yes.

1341

Q. Did you make a trip from Tacoma, Washington, at the request of the District Attorney, to testify in this case? A. Yes.

Q. Do you have any nickname? Do you have any nickname in private life? A. Yes.

Q. What do they call you? A. Red Tiplet.

By the Court:

Q. Tiplet? A. Tiplet.

Q. Is that a pigeon? A. Yes.

Q. A red pigeon? A. Yes.

1342 *Cpl. Simon Eisler—For People—Direct*

The Court: A tiplet is a breed of pigeon.

By Mr. McGough:

Q. How long have you been in the Army, please? A. Since January 20, 1941.

Q. That would be, roughly, about two and a half years? A. Yes.

Q. Do you know the defendant, Jake Rudish, sitting here in Court? A. Yes.

1343

Q. How long do you know him, please? A. About 15 years.

Q. Do you know the defendant, Morris Malinski? A. Yes, sir.

Q. How long do you know him? A. About three years.

Q. Now, some time in the latter part of 1940, or the early part of 1941, did you have any conversation with the defendant Malinski? A. Yes, sir.

Q. With respect to an errand? A. Yes, sir.

Q. Tell this Court and jury, please where you were at that time when you had the conversation?

1344

Mr. Solovei: I object to this line of testimony on the ground it is highly improper, incompetent, irrelevant and immaterial, and too remote from the alleged time of the alleged commission of this crime, as alleged in this indictment.

The Court: I cannot tell at this time. I am not a fortune teller or a soothsayer. Proceed.

Mr. Solovei: This is prior to January, 1941.

The Court: Proceed.

Mr. Solovei: I object.

Mr. Morritt: Defendant Rudish makes the same objection.

By Mr. McGough:

Q. Where was the conversation? A. Citadel Club, Fourth Street and Avenue C. 1346

Q. County of New York? A. Yes.

Q. Now, will you tell us please, what the conversation was, what he said to you and what you said to him?

Mr. Solovei: I object to that.

The Court: Will you step up here, please, Mr. District Attorney, and tell me what you propose to show.

(Mr. McGough confers with the Court.)

The Court: The objection is overruled.

Mr. Geoghan: May I interpose an objection on behalf of Indovino and ask your 1347 Honor to instruct the jury that whatever he is going to testify to is not binding on Indovino?

The Court: The jury is so instructed.

Mr. Carabba: May I respectfully object on behalf of the defendant Rudish as to anything he may testify in the absence of the defendant Rudish.

The Court: Sustained.

Mr. Carabba: May the jury be instructed?

1348 *Cpl. Simon Eisler—For People—Direct*

The Court: The jury is so instructed. (Question read.)

A. I was asked—

Mr. Solovei: Have we got the date on that, your Honor?

Q. Can you fix the time for counsel, please? Give us your best recollection of the time? A. The latter part of December. The exact date, I
1349 don't know.

By Mr. Solovei:

Q. What year? A. 1940.

By Mr. McGough:

Q. Was it around the holidays, if you know? A. Pretty close to them.

Q. Was it before or after the holidays? A. Before.

1350

Mr. Solovei: I renew my objection.

The Court: Objection sustained.

By Mr. McGough:

Q. All right, give us the conversation, please. A. I was asked—

Mr. Solovei: I object.

The Court: You made your objection and I have ruled on it.

Mr. Solovei: You just said, "Sustained".

The Court: I beg your pardon. It is my fault. I apologize. I meant "overruled."

Mr. Solovei: I take an exception.

A. I was given a ticket to pick up a package, in the Terminal and then bring it down to the Citadel Club.

Q. Who gave you the ticket? A. Moish Malinski.

Q. What kind of ticket was it? A. It was a 1352
stub.

Q. What kind of stub? A. That you get when you deposit packages in the subway.

Q. Did he say anything to you when he gave you the stub? A. No, sir; just asked me to pick the package up.

Q. Did he tell you where to go for the package? A. He told me where to go for it, yes, sir.

Q. What did he say, please? A. He just asked me to pick the package up and bring it back.

Q. Where? A. At the Citadel Club.

Q. Where did he ask you to go to get the pack- 1353
age? A. It was at the Citadel Club that he asked me to go for the package.

Q. I understand that the conversation was at the Citadel Club; correct? A. Yes.

Q. Did he ask you to go some place and pick up a package? A. Yes.

Q. Where was that some place? A. Vicinity of 42nd Street.

Q. Did he give you any money? A. Yes; four dollars. Gave me four dollars. I went uptown and picked the package up and I brought it back and when I brought it back he had opened it, and

I saw four pistols, two fountain pen guns and two .38's.

Q. How were the .38's, were they wrapped or unwrapped? A. They were wrapped in stockings.

Q. In addition to the fountain pen guns and the two .38's, did you see any other object in the package? A. There were more stockings, but I don't know what was in them.

Q. Who opened the package when you brought it back to the Citadel Club? A. Moish Malinski.

Q. At the time you went uptown to get the package, did you know what the package contained? A. No, sir.

Q. When for the first time did you know the contents? A. When Moish Malinski opened the package.

Q. That was the same day, was it? A. Yes, sir.

Q. You don't know the defendant Indovino, do you? A. No.

Mr. Solovei: I now move to strike the testimony out on the ground it is highly improper, prejudicial to the defendant, violation of the defendant's rights; it is incompetent, irrelevant and immaterial, and in no wise connected with the alleged crime as alleged in this indictment, February 15th, 1941.

The Court: I call to your attention the testimony of the witness, Spielfogel. Of course, his credibility is entirely for the jury. I am merely referring to testimony, not to facts. The facts the jury must determine for themselves. But merely on

your objection, I call your attention to the testimony of Spielfogel to the effect that he had a conversation with Malinski, and that Malinski told him that the guns that were used in the killing of Patrolman Fox were the same guns that were taken by Red Tiplet from some receptacle or depository in the neighborhood of the Grand Central Station. That is the sole reason why I am admitting this testimony.

Mr. Solovei: And I except to your Honor's reasoning. 1358

The Court: All right. Proceed to cross-examine.

Mr. Morritt: The defendant Rudish makes the same objection.

The Court: The objection is sustained as far as the other defendants are concerned, other than the defendant Malinski.

Mr. Solovei: I now, in view of this line of testimony, move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied; exception. 1359

Cross-examination by Mr. Solovei:

Q. How long do you know Spielfogel, Eisler? A. About four years.

Q. Are you very friendly with him? A. An acquaintance.

Q. Been out with him? A. No, sir.

Q. Did you meet him at the Citadel Club? A. I saw him there.

Q. How often did you see him there? A. Not very often.

1360 Q. Would you say at an average of once or twice a week? A. Something like that.

Q. Play cards with him? A. No, sir.

Q. Eat with him? A. No, sir.

Q. Drink with him? A. No, sir.

Q. Did you visit his home? A. No, sir.

Q. Did he visit your home? A. No, sir.

Q. Do you know Yellin? A. Yes, sir.

Q. How well do you know Yellin? A. Know him for quite a few years.

1361 Q. How long? A. Practically all my life.

Q. You live now on Pitkin Avenue, do you? A. Yes, sir.

Q. Before that, you lived on the East Side? A. Yes, sir.

Q. And you used to go out with Yellin? A. Yes, sir.

(At this point, at the request of the Court, the stenographer read the testimony of the witness to the effect that he entered the Army, January 20, 1941.)

1362 By the Court:

Q. In other words, you were in the Army before this crime was even committed, weren't you? A. Yes, sir.

By Mr. Solovei:

Q. Did you go out with Yellin? A. Yes, sir.

Q. You knew that Yellin and Spielfogel were two professional stickup men, didn't you? A. No, sir.

Q. Did you ever see guns on them? A. No, sir.

Q. You live in the Brownsville section of Brooklyn, and you used to go to the Citadel Club several times a week, is that it? A. No, sir.

Q. How often did you go there? A. At the time that I went to the Citadel Club I lived a half a block away from the club.

Q. Where did you live in 1940? A. 336 East Fourth Street.

Q. How far away was that from where Spielfogel lived? 1364 A. Don't know where Spielfogel lived.

Q. How far was it away from where Yeliin lived? A. Four blocks.

Q. Were you working at that time? A. No, sir.

Q. How long were you out of employment? A. About a year.

Q. In other words, for the entire year of 1940, you were not working at all? A. No, sir.

Q. Did you work in 1939? A. Yes, sir.

Q. Where did you work? A. Garment Center.

Q. Whom did you work for? 1365 A. I forget the name of the concern, but it was a trucking outfit on 37th, 222 West 37th Street.

Q. How long did you work there? A. About seven months.

Q. Were you a Union man? A. No, sir.

Q. Were you a helper on a truck? A. I pushed the truck, hand truck.

Q. One of these hand trucks? A. Yes.

Q. You don't know the name of the firm you worked for? A. I don't remember it right offhand.

1366 *Cpl. Simon Eisler—For People—Cross*

Q. How long did you work there? Seven months? A. Yes.

Q. Where did you work before that? A. In a laundry on 99th Street.

Q. How long did you work there? A. About three weeks.

Q. Do you know what number 99th Street you worked at? A. Between First and Second Avenue.

Q. How often did you see Spielfogel when you
1367 were not working in 1940? See him often? A. No, sir.

Q. Did you visit the Citadel Club often when you were not working? A. Yes, sir.

Q. Did you play cards there? A. Yes, sir.

Q. Play for big stakes? A. No, sir.

Q. Shoot crap there? A. Not in the club.

Q. Where did you shoot crap? A. In the street.

Q. You had no bank account in 1940, did you? A. No, sir.

Q. And the only visible means you had of supporting yourself was the work that you ac-
1368 tually did yourself, is that correct? A. Yes, sir.

Q. Did you live with your family at that time? A. Yes, sir.

Q. You were not married? A. No, sir.

Q. Shoot crap with Spielfogel? A. No, sir.

Q. Shoot crap with Yellin? A. Yes, sir.

Q. In the street? A. Yes, sir.

Q. Did you go to any of the private crap games? A. No, sir.

Q. Did you shoot crap games at the Citadel Club? A. No, sir.

Q. Now, they call you Tiplet, is that it? A. Yes, sir.

Q. Were you ever convicted of any crime? A. No, sir.

By the Court:

Q. What? A. No, sir.

By Mr. Solovei:

Q. Did you know Spielfogel when he—were you friendly with Spielfogel when he had a case pending here in Brooklyn? A. No, sir. 1370

Q. When was it for the first time in your life that you ever spoke to anybody about this case? A. When I was brought down here.

Q. When was that? A. June 17th, June 12th rather.

Q. Of this year? A. Yes, sir.

Q. Before that, you never told anybody about it? A. I did not know anything about it.

Q. You never spoke to Spielfogel? A. No, sir.

Q. You never told Spielfogel about the package you went for? A. No, sir. 1371

Q. And you never told him that Malinski ever sent you for a package somewheres? A. No, sir.

Q. You never told Yellin about it? A. No, sir.

Q. And you never told any police officers about it? A. No.

Q. And then at Citadel Club sometime in December of 1940, this happened? A. Yes, sir.

Q. Was it in the early part of December? A. No; a little before Christmas.

Q. Who was present when Malinski asked you to go after the package? A. Nobody.

1372 *Cpl. Simon Eisler—For People—Cross*

Q. Where was it he sent you for this package? A. It was in the vicinity of 42nd Street.

Q. What kind of a place was it? A. It was a newsstand.

Q. Where is the newsstand? A. Don't know the exact address.

Q. Was it a corner newsstand? A. No, sir; it was in the subway.

Q. In the subway at a newsstand? A. Yes.

Q. One of these newsstands operated by the
1373 railroad company? A. No, sir; it was cigar stand and newsstand.

Q. In the subway station? A. Yes, sir.

Q. 42nd Street and what? Broadway, Lexington Avenue—what? A. In that vicinity, I don't know the exact address.

Q. Did you get out of the subway at 42nd Street? A. Yes.

Q. Was it at the Grand Central Station? A. I don't remember.

Q. Was it at the 42nd Street and Broadway terminal? A. I don't remember.

Q. Did you talk to some man at the cigar
1374 stand? A. Yes.

Q. Do you know the man's name you spoke to? A. No, sir.

Q. Was there more than one man there behind the cigar stand? A. No, sir.

Q. Was this package wrapped in newspaper or wrapping paper? A. Wrapping paper.

Q. Was not in a box? A. It was in a box.

Q. In a box? A. Yes.

Q. The box was wrapped in wrapping paper? A. Yes, sir.

Q. Did you have a receipt or something to give to the man from the stand? A. Yes, sir.

Q. What was on the receipt? A. Just a stub with a number.

Q. What kind of stub was it? A. Yellow.

Q. What was it made out of? A. Cardboard.

Q. A plain ordinary cardboard stub? A. Yes, sir.

Q. And had a number on it? A. Yes, sir.

Q. Did it have a ring or anything on this cardboard stub? A. Yes, sir. 1376

Q. Did the ring have a number? A. No, sir.

Q. Outside of the number was there any name or address on this cardboard stub? A. There was writing on there. I believe it did have an address, but I don't remember.

Q. All he told you, he said, "You go to 42nd Street to a newsstand and give up this stub, and he will give you a package"? Is that it? A. Yes, sir.

Q. And you, without knowing just who the person was you were going to talk to or where this newsstand was situated, you just took this 1377
this stub and went to 42nd Street to a newsstand; is that right? A. That is right.

Q. You say you got a package? A. That is right.

Q. And then you say you took this package and went back to the Citadel Club; is that right? A. Yes.

Q. Was this during the day time? A. The afternoon.

Q. Was it during the week? A. Yes, sir.

Q. What time of day was it would you say? A. When I came back?

1378 Q. When you went there, and came back, yes. A. When I went there, it was in the morning.

Q. In the morning? A. Yes, sir.

Q. What time did you come back? A. About three o'clock, three or four o'clock.

Q. Did you get the package in the morning? A. No, sir.

Q. Did you see Spielfogel in the morning? A. No, sir.

Q. Did you see Yellin in the morning? A.
1379 No, sir.

Q. Did you go back to the Citadel Club? A. Yes, sir.

Q. And when you went back there did you hang around the Citadel Club? A. Yes, sir.

Q. And then you went back to this place again? A. No, sir.

Q. Did not go back again? A. No, sir.

Q. Did you have the package with you? A. Yes, sir.

Q. So you did not go directly from the stand where you got the package directly back to the
1380 Citadel Club, is that it? A. I went right back.

Q. You say you got it in the morning and came back in the afternoon? A. I said I picked it up after I had gone; coming back I picked it up.

Q. If I understand you right you said you left in the morning for the package, am I right? A. I left in the morning to go out looking for a job.

Q. So that he gave you this cardboard ring, with a ring on it— A. Stub.

Q. In the morning? A. Gave it to me the night before.

Q. Gave it to you the night before? A. Yes, sir.

Q. Well, I think you said a little while ago he gave it to you in the morning, didn't you? A. No, sir.

Q. Now he gave it to you the night before and asked you to stop off at 42nd Street to get this package? A. Yes, sir.

Q. So that you went out for a job in the morning? A. Yes, sir.

Q. Is that right? A. Yes, sir. 138

Q. You did not get a job? A. No, sir.

Q. And then you went to some newstand on 42nd Street? A. Yes, sir.

Q. And got this package? A. Yes, sir.

Q. And then went back to the club, is that right? A. Yes, sir.

Q. And when you got back to the club you saw Spielfogel there? A. No.

Q. Saw Yellin there? A. No.

Q. You, Spielfogel and Yellin went out for lunch yesterday, didn't you? A. Yes, sir.

Q. Did you go any other time for lunch with them? A. Yes, sir. 138

Q. Often? A. Once a day.

Q. Once a day? A. Yes, sir.

Q. With Yellin, too? A. Yes, sir.

Q. Go out to dinner with him, too? A. No, sir.

Q. Did you have dinner with him at any time at all? A. No, sir.

Q. You would all sit at one table together while you were having your lunch? A. Yes.

1384 *Cpl. Simon Eisler—For People—Cross*

By the Court:

Q. Was there a detective there? A. Yes, sir.

By Mr. Solovei:

Q. Now when you got back to the Citadel Club were there many people there? A. No, sir.

Q. How many people were there? A. I don't remember.

1385 **Q. What? A. I don't know.**

Q. When you came back did you sit and speak to Malinski in some big room there? A. It was upstairs.

Q. You went upstairs? A. Yes, sir.

Q. With him? A. Yes, sir.

Q. Who else went up? A. Nobody.

Q. Was there anybody upstairs? A. No, sir.

Q. And then you say in your presence he opened this box? A. Yes, sir.

Q. Did you say anything when he opened the box? A. No, sir.

1386 **Q. Did not say a word at all to him? A. No, sir.**

Q. He said nothing at all to you? A. No, sir.

Q. Just opened the box and closed the box? A. That is right.

Q. What did you do after that? A. Walked away.

Q. Did you remain there? A. I walked down. I don't know where he went.

Q. When you say you walked down do you mean you walked down and left the building or remained in the building? A. Left the building.

Q. Did you come back again that same day? A. Yes; sir.

Q. Did you see him there that same day? A. No, sir.

Q. Did you see Spielfogel or Yellin there that same day? A. No.

Q. How soon after this day did you meet Spielfogel or Yellin? A. The day after, two days after; don't remember.

Q. Did you tell them about the package? A. No, sir. 1388

Q. Did you tell them what you saw? A. No, sir.

Q. Did you tell anybody what you saw? A. No, sir.

Q. Not even your friend Yellin? A. No, sir.

Q. Prior to your coming to court here you spoke to Spielfogel, didn't you? A. Today?

Q. No; before today? A. No, sir.

Q. You mean you did not talk to him since you are back? A. Yes; I spoke to him since I am back; yes.

Q. When did you get back? On June 12th, 1389 you say? A. Yes, sir.

Q. Where was it that you saw Spielfogel on June 12th? A. District Attorney's office.

Q. How much time did you spend with him there? A. No time.

Q. Were you sitting in the same room with him? A. No, sir.

Q. Did you sit in the same room with Yellin? A. No, sir.

Q. Was it in the morning of June 12, 1943, when you saw Spielfogel and Yellin at the District Attorney's office? A. Yes, sir.

1390

Q. Did you go out to lunch together? A. Yes, sir.

Q. Did you talk to him while at lunch here? A. Yes, sir.

Q. Both Spielfogel and Yellin? A. Yes, sir.

Q. Did you tell Spielfogel or Yellin what you came down for? A. No, sir.

Q. Did Spielfogel tell you what he knew? A. No, sir.

Q. Did Yellin tell you what he knew? A.

1391 No, sir.

Q. Now, on the 13th and 14th and 15th did the same thing transpire? A. No, sir.

Q. You saw each other during those times, didn't you? A. No, sir.

Q. Did you see him on the 13th? A. No, sir. The 13th was a Sunday.

Q. Did not see him? A. No, sir.

Q. The 12th was a Saturday? A. Yes.

Q. Do you know what time it was that you arrived at the District Attorney's office on Saturday the 12th? A. About quarter past ten.

Q. In the morning? A. Yes, sir.

1392

Q. And what time was it that you left there? A. About three o'clock.

Q. In the afternoon? A. Yes, sir.

Q. And you made a statement? A. Yes, sir.

Q. That was the first time you ever made a statement? A. That is right.

Q. Before that you never said anything to anybody and you never spoke to anybody about it at all; is that right? A. That is right.

Q. On the 13th did you see Spielfogel, on Sunday the 13th? A. No, sir.

Q. Yellin? A. No, sir.

Q. Did you go back to the District Attorney's office? A. No, sir.

Q. So that on the 13th you spoke to nobody about this case or saw nobody about it; is that right? A. That is right.

Q. Now on the 14th were you again in the District Attorney's office? A. No, sir.

Q. Were you here? A. No, sir.

Q. Where were you on the 14th? A. Home.

Q. You were not around the court at all? A. No, sir.

Q. At any time? A. No, sir.

Q. Were you in the District Attorney's office? A. That is right.

Q. And on the 15th did you see Spielfogel then? A. Yes, sir.

Q. Where? A. District Attorney's office.

Q. What time did you see him there? A. The evening.

Q. What time did you go there? A. About 4:30.

Q. Did you see Yellin there? A. Yes, sir.

Q. Were you in one room together? A. No, sir.

Q. Where did you see him? A. In the corridor.

Q. Did you talk to him? A. No, sir.

Q. Said "hello" to him? A. Said "hello".

Q. To either one or both of them? A. That is right.

Q. Did you go out to dinner that night together? A. No, sir.

Q. Did you have lunch that day together? A. No, sir.

1396 Q. How many times did you lunch with Spielfogel and Yellin? A. Two or three times.

Q. Can you tell us when those two or three times were? A. Yesterday afternoon, Tuesday—

Q. And Wednesday? A. Saturday.

Q. Tuesday was the 15th? A. Yes, sir.

Q. How about Wednesday the 16th? A. Had dinner with them—lunch, rather—during the afternoon.

1397 Q. Just had luńch with them? A. Yes.

Q. No dinner? A. No dinner.

Q. Wednesday the 16th was only yesterday? A. That is right.

Q. You left the court-room with them, too, didn't you? A. That is right.

Q. Go back to the District Attorney's office with them? A. Went home.

Q. Did you go back to the District Attorney's office first? A. No, sir.

Q. You walked with them and while walking with them did you talk to them? A. No, sir.

1398 Q. You are not trying to protect Spielfogel here, are you? A. No.

Q. Or Yellin either, are you? A. No.

Q. You are very friendly witht Yellin, aren't you? A. Yes.

Q. You are pretty friendly witht Spielfogel? A. No, sir.

Q. Did Spielfogel tell you he was testifying in this case? A. No, sir.

Q. Not a word at all about his testimony? A. No, sir.

Q. You did not ask him what he was doing down here? A. Didn't ask him anything.

Q. Did not ask Yellin what he was doing? A. Didn't ask him anything.

Q. They did not ask you what you were doing down here? A. No, sir.

Q. Do you know whether Yellin and Spielfogel have been doing long terms of imprisonment? A. I knew Yellin was.

Q. You did not know what Spielfogel was? A. No, sir.

Q. You were not here when Yellin was sentenced, were you? A. Yes, sir. 1400

Q. You were in the States? A. Yes, sir.

Q. Did you know that Yellin and Spielfogel together were convicted of the crime of robbery? A. No, sir.

Q. Yellin never told you that? A. No, sir.

Q. Did Yellin tell you what sentence he got? A. No, sir.

Q. Did you at any time find out what sentence he got? A. Somebody told me something.

Q. What? A. About it, but it did not mean much.

Q. What? A. Did not mean anything. Somebody told me something about it. 1401

Q. You would like to help out Yellin if you can if you thought you could, wouldn't you? A. No, sir.

Q. The Judge asked you about the name Tiplet. A. Yes, sir.

Q. Red.

The Court: Tiplet.

Q. Is this Tiplet or Tipler? A. Tiplet.

1402 *Cpl. Simon Eisler—For People—Cross*

By the Court:

Q. You are Red Tiplet? A. That is right.

By Mr. Solovei:

Q. Did they give you that name Red Tiplet because you were a bird? A. No, sir.

Mr. McGough: Object to that.

1403 Q. Was that just a nickname that the men around the neighborhood gave you, the boys around the neighborhood? A. That is right.

Q. Were you ever in the Court of Special Sessions? A. No, sir.

Q. What? A. No, sir.

Q. Never in any court? A. No, sir

Q. Charged with anything? A. No, sir.

The Court: You know that question is improper.

Mr. Solovei: I am going to follow it

1404 up.

The Court: I will let you ask it anyhow.

Mr. Solovei: I am going to follow it up.

The Court: That is all right.

By Mr. Solovei:

Q. You know what a suspended sentence means? A. Yes.

Q. Did you ever get anything like that? A. No, sir.

Mr. Solovei: That is the only reason I asked.

The Court: All right.

Q. Were you a friend of Abe Reles? A. Who?

Q. Abe Reles from Brownsville? A. No, sir.

Q. Did you know Beitler? A. Who?

Q. Beitler—Ebbie? A. Yes, sir.

Q. How well did you know Beitler, Ebbie? A. Went to school with him.

Q. What name did you know him by? A. Ebbie.

By the Court:

Q. Brought up on the East Side? A. Yes.

Q. Around what street? A. Fifth Street, sir.

Q. Right in the tenement house district? A. Yes.

By Mr. Solovei:

Q. Did you see him over at the Citadel Club? A. No, sir; never came there.

Q. Never came to the Citadel Club? A. No, sir.

Q. Did you see him with Spielfogel? A. No, sir.

Q. Or Yellin? A. No, sir.

Q. Where did you see Beitler when you did see him? A. I saw Beitler many years ago, about six or seven years back.

Q. And not since then? A. No, sir.

Q. And you mean to tell this Court and jury that the defendant Malinski just opened this package and exhibited to you four revolvers;

is that right? A. I saw two revolvers and two fountain pen guns.

Q. Two fountain pen revolvers?

The Court: Two fountain pen guns.

Q. He just opened the package and showed them to you? A. Yes.

Q. Did you examine them? A. No, sir.

Q. Did not look into it? A Saw them and walked away.

1409 Q. Just saw them and walked away? A. Yes.

Q. It was something unusual for you to see, though? A. Saw it on cops.

Q. What? A. I saw them before, patrolmen.

Q. You saw cops have them? A. That is right.

Q. Saw them in the Army too? A. That is right.

Q. But this, at this particular time, this was something unusual, wasn't it? A. That is right.

Q. Something that never happened in your life before, did it? A. That is right.

Q. And yet you kept it as a secret in the inner
1410 recesses of your heart and never said anything about it to anybody at all? A. That is right.

Q. Never to your friend Yellin, and never your friend, Spielfogel? A. No.

The Court: He did not say Spielfogel was his friend.

By Mr. Solovei:

Q. You said Spielfogel was your friend? A. Acquaintance.

Q. Isn't he a friend of yours? A. I know him.

Q. Isn't he a friend of yours? A. Never go out with him; we were not friends.

Q. You were in his company with Yellin at times, weren't you? A. No, sir.

Q. You never told it to members of your family either, did you? A. No, sir.

Q. Of course, you never told it to any police officers? A. No, sir.

Q. And the first time that ever in your life you told it to anybody at all was when you came here on June 12th, 1942, is that right? A. That is right. 1412

Mr. Geoghan: No questions on behalf of Indovino.

Redirect examination by Mr. McGough:

Q. How old are you? A. Twenty-six.

Q. In 1940, you were about twenty-three or so? A. Yes.

The Court: Gentlemen of the jury, we are about to take a luncheon recess. I admonish you not to discuss this case either among yourselves or with any other person, or permit any one to speak to you about this case, or discuss it in your presence. You must keep your minds open. Don't form or express any opinion or conclusion as to the guilt or innocence of the defendant on trial or either of them, or any of them, until the case is finally submitted to you for your consideration after a charge by the Court on the law. You may retire now and return at 2:15 p. m. 1413

1414 *Peter Shamin—For People—Direct*

AFTER RECESS. TRIAL RESUMED.

PETER SHAMIN, residing at 49 Avenue B, Manhattan, New York City, called as a witness in behalf of the People, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Your name is Peter Shamin? A. Yes, sir.

1415 Q. Peter, how old are you? A. I am eighteen and a half.

Q. You are eighteen and a half years old? A. Yes, sir.

Q. Do you know the defendant Morris Malinski? A. Yes, sir.

Q. How long do you know him? A. I know him for about two and a half to three years.

Q. Now some time in 1940 or 1941, were you working for a store on First Avenue in the County of New York? A. Yes, sir.

Q. And do you remember the name of the man

1416 who owned the store? A. Yes, sir.

Q. What was it? A. Max Rouch.

Q. Max Rouch? A. Yes, sir.

Q. Did you ever see the defendant Morris Malinski there in that store? A. Yes, sir.

Q. What was he doing at the place? A. He was working there.

Q. What kind of work was he doing? A. He was a salesman; stock clerk.

Q. Now do you recall the month of February 1941? A. Yes, sir.

Q. Were you working there on a part-time basis or whole-time basis? A. I was working

there on Saturdays. I went to school during the week.

Q. What school were you attending that time? A. I was attending the High School of Commerce.

Q. Now do you recall sometime about the middle of February 1941 having a conversation with Morris Malinski about an errand? A. Yes, sir.

Q. Will you tell us, please, if you recall what date it was and about what time of the day it 1418
was? A. It was about—it was in the afternoon close to four o'clock.

Q. Do you remember what day it was? A. No, sir, I don't remember the date.

Q. What day of the week? A. It was on a Saturday.

Q. Did he say something to you? A. Yes, sir.

Q. Tell the Court and jury what Morris Malinski said to you at that time and place.

Mr. Carabba: Now, if your Honor pleases, on behalf of the defendant Rudish, 1419
I object to it on the ground that whatever was said between the defendant Malinski and this witness is not binding on the defendant Rudish.

Mr. Geoghan: And the same in behalf of Indovino.

The Court: Well, I will decide in favor of the defendants. The objection of Mr. Geoghan is sustained. The objection of Mr. Carabba is sustained.

By Mr. McGough:

Q. Tell us what Malinski said to you at that time. A. Malinski first called me when I was in the street. I turned around and he was in the hallway.

Q. I cannot hear you. A. Malinski called me. He was in the doorway of the hall. I was on the street. I turned around and he said, "Pete, go get a bag of pieces in the hall".

1421 Q. I cannot hear you. A. "Pete, go and get the bag of pieces in the hall. They are between the napkin boxes", and he told me to put it into the toilet.

Mr. Solovei: I object to it on the ground it is highly improper.

The Court: Objection overruled.

Mr. Solovei: Exception.

By Mr. McGough:

Q. Now you mentioned a hallway? A. Yes.

1422 Q. Was that the hallway going to the place upstairs? A. No, sir.

Q. Tell us what doorway it was. A. That doorway is supposed to have been padlocked. The building was not used by any families or any tenants.

Q. How close was the hallway to the store where you were working that day? A. The hallway was the same building.

Q. Was there anything in that hallway while you were working there? A. Yes, sir.

Q. What was in it? A. We used to keep merchandise there.

Q. After he told you to go into the hallway and get the bag of pieces, that you would find between two napkin boxes, what did you do?

Mr. Solovei: I object to these questions. I do not recollect that being the testimony.

The Court: Did he say anything about, between the napkins? 1424

By Mr. McGough:

Q. Did you say a moment ago, "Get the bag of pieces between the napkin boxes"? A. Yes, sir.

Q. Is that what this defendant Malinski told you to do? A. Yes, sir.

Q. Did you do it? A. Yes, sir.

Q. Tell this Court and jury what you found between the napkin boxes in the hallway? A. I found a bag.

Q. And will you describe it, please, with reference to the size and the weight and the color of the bag that you say you found? A. The bag— 1425

Mr. Solovei: All over my objection, this testimony is going in, I assume, your Honor?

The Court: I have in mind the Zackowitz case.

Mr. McGough: I know the Zackowitz case. This is on the issue between the People and Malinski on the 15th of Feb-

ruary, and there is testimony, I submit, without making a detailed statement, showing what transpired before and after, between this particular individual and the defendant.

The Court: I permitted the other testimony given by Tippler or Tiplet because of the alleged conversation had between Spielfogel and the defendant Malinski, as related by him. Now have you shown that
1427 the subject matter of the inquiry here is the same as the one referred to by the Tippler?

Mr. McGough: That is the People's contention, that this testimony leads right in and dovetails with the witness Yellin. You may recall when Yellin testified, Judge, that he saw Malinski at about the hour of 8 p. m. on the 15th of February, 1941, with a bag, which he described here, and this testimony, I say is competent and it will tend, if I might be so bold as to
1428 state, to connect Malinski with that particular bag.

Mr. Solovei: In view of the statement of the District Attorney, I am going to make an application now to move for the declaration of a mistrial and the withdrawal of a juror, upon the ground that the statement is highly prejudicial, and not evidence, and in violation of the defendant's rights, the constitutional rights for a fair and impartial trial.

The Court: The motion denied. This is not evidence, Gentlemen of the jury, it

is conversation between the Court and the District Attorney. Nothing takes the place of evidence, and you men are all intelligent men of the community, and you appreciate that. Offers of proof by lawyers and District Attorneys do not take the place of proof. I am going to sustain the objection at this time. The occasion may arise when the same question may be asked later during the trial. That I do not know. That remains to be seen but 1430
at this time I will sustain the objection.

By Mr. McGough:

Q. Now Peter, what were your working hours there on Saturday at that time? A. I worked until ten o'clock at night.

Q. And did you take any time for supper, as a rule? A. Yes, sir.

Q. Did Morris Malinski leave at any time on a Saturday for his supper? A. Yes, sir.

Q. Now with respect to that particular date, when he asked you to do something in the hall, 1431
do you remember what time he went to supper?

Mr. Solovei: I object to the question.

The Court: Objection sustained as to form. I have stricken out all reference to something in the hall. I tell the jury to disregard it at this time.

By Mr. McGough:

Q. Can you tell this Court and jury, Shamin, what time Malinski went to supper that night?

1432

Mr. Solovei: I object.

The Court: Objection overruled.

Mr. Solovei: I object to it upon the ground that there is no date set as to what night he is talking about.

The Court: He said it was on Saturday in February.

Mr. Solovei: That is right.

The Court: When was it, the beginning of the month or the end of the month, or

1433 the middle of the month?

The Witness: It must have been about the beginning of the month because I remember the school term had just begun.

By Mr. McGough:

Q. Could it have been later?

Mr. Solovei: I object to the question. The witness testified, "It could have been", is speculative.

The Court: He may ask him if he de-

1434 sires to change his testimony.

Mr. Solovei: I except.

The Court: Proceed.

By Mr. McGough:

Q. I say, could it have been later than the beginning of February?

Mr. Solovei: I object to the question.

The Court: Objection sustained. Are you certain that it was the beginning of February?

The Witness: It could have been within those two weeks.

By Mr. McGough:

Q. What two weeks? A. The first two weeks of February.

Q. Do you know when Malinski quit at that particular store, what month? A. Yes, he quit about a month after that.

Q. What time? That would be March? A. Yes. 1436

Q. Do you know what day in March? A. No, sir.

Q. Well, with reference to the time that he quit, can you tell us how much time before the time he quit in March it was that he went out to supper on this particular night?

Mr. Solovei: I object to the question.
The Court: Objection overruled.
Mr. Solovei: Exception.

By Mr. McGough: 1437

Q. In other words, how much later after this particular night in question did Malinski quit, if you know?

Mr. Solovei: I object to the form of the question.
The Court: Objection overruled.
Mr. Solovei: Exception.
The Witness: About a month later.

1438 *Peter Shamin—For People—Direct*

By Mr. McGough:

Q. What time did he go to supper that night?

Mr. Solovei: I object to the question.

The Court: Objection overruled.

Mr. Solovei: Exception.

The Witness: He went to supper about seven o'clock.

1439 By Mr. McGough:

Q. And by the time that you went to supper, had he returned? A. No, sir.

Q. What time did you go to eat that night? A. About a quarter to eight.

Q. And what time did you return? A. About in forty-five minutes.

Q. That would be about 8:30? A. Yes, sir.

Q. And when you came back, was Malinski there? A. No, sir.

Q. Now did you see Malinski again that night at any time? A. No, sir.

1440 Q. After he went to supper? A. No, sir.

Q. Did you see him between the period of 8:30 and the time that the store closed that night? A. No, sir.

Q. I show you People's Exhibit B, marked for identification, and ask you if you ever saw that with the defendant Malinski?

Mr. Solovei: I object to the form of the question.

The Court: On what ground?

Mr. Solovei: On the ground it is leading.

The Court: Objection sustained.

By Mr. McGough:

Q. I hand you People's Exhibit B, and ask you to look at it. A. Yes.

Q. Did you ever see that before? A. I seen a hat like it.

Q. You saw a hat like that before? A. Yes, sir. 1442

Q. Where did you see it?

Mr. Solovei: I object to that.

The Court: Objection overruled.

Mr. Solovei: Exception.

The Witness: I seen it in the store.

By Mr. McGough:

Q. Who was present? A. Malinski, a boy known as Slip, and I.

Q. Did Malinski say anything about a hat like 1443 that at that time? A. Yes, sir.

Q. What did he say? A. He said he got it as a present.

Q. Did he say from whom he got it? A. No, sir.

Mr. McGough: Your witness.

The Court: I am going to strike out this witness' testimony with regard to everything that he has testified to other than the hat.

1444 Mr. McGough: I submit—

The Court: I am going to instruct the jury to disregard it. I am going to let the testimony with reference to the hat stand. Everything else is stricken out, and the jury is instructed to disregard it at this time, with regard to the testimony concerning the fact that he was in the store one night and Malinski did not come back. There is no definite date as to
1445 that. That is purely speculative. I strike that testimony out and tell the jury to disregard it as having no probative force whatsoever. With respect to him going into the hallway about some package, I will strike that out and instruct the jury to disregard that at this particular time.

Mr. Solovei: I now renew my application—

The Court: But the testimony with reference to the hat, I will permit that testimony to stand. That may be considered
1446 by the jury for whatever it is worth.

Mr. Solovei: I now renew my motion in view of this witness' testimony, for the withdrawal of a juror and the declaration of a mistrial, upon the ground that the testimony adduced by this witness is highly prejudicial and in violation of the defendant's rights.

The Court: Motion denied.

Mr. Solovei: Exception.

The Court: Proceed.

Cross-examination by Mr. Solovei:

Q. Before you said you saw a hat, is that right? A. That is right.

Q. Something like this hat that you see now? A. Yes, sir.

Q. It is nothing unusual for you to see a brown hat, is it? A. (No answer.)

Q. Is it? A. No, sir.

Q. Did Malinski speak to you about some Moe Penn hat? A. No. 1448

Q. Did you ever hear the word "Moe Penn" used before? A. No, sir.

Mr. Solovei: I would like to get the defendant's hat from the pen upstairs.

The Court: Yes. You may bring down the defendant's hat.

Mr. Carabba: May I ask your Honor, respectfully, that whatever testimony this witness has given on the stand, and that your Honor subsequently struck out, has no force or binding effect on my client, the defendant Rudish. 1449

The Court: Why, certainly, it has not.

Mr. Geoghan: That has already been asked as to Indovino.

Mr. Carabba: And also the testimony with reference to the hat.

The Court: Certainly.

Mr. Geoghan: And the whole testimony as to my client Indovino.

The Court: Certainly.

1450

By Mr. Solovei:

Q. While we are waiting for the hat; how long have you been working there now? A. I worked there that summer.

Q. Just that summer? A. Yes, sir.

Q. The summer of what? A. The summer of 1940.

Q. You worked there in the summer of 1940? A. Yes, sir.

1451

Q. How long did you work in the summer of 1940? A. I worked all summer.

Q. You mean every day? A. Yes, sir.

Q. And later on you worked Saturdays? A. Yes, sir.

Q. Now look at this hat and see if you ever saw that hat before.

The Court: Mark it for identification.

(Hat marked Defendants' Exhibit C for Identification.)

1452

The Witness: I seen a hat like that.

By Mr. Solovei:

Q. You saw Malinski have a hat like that, is that correct? A. Yes.

Q. And while he worked in the store where you were employed, in Rouch's store, is that correct? A. Yes, sir.

By the Court:

Q. He said he got it as a present? A. Yes, sir.

Q. That is what he said? A. Yes.

By Mr. Solovei:

Q. Is that right? A. Yes, sir.

Q. Now look inside of the hat and see if the name is in that hat—

Mr. McGough: That is objected to.

Q. —does not refresh your recollection as to what make of hat he told you he had?

1454

Mr. McGough: I object to it.

The Court: Objection sustained. There is no testimony here that Malinski ever told him anything as to the make he had.

Mr. Solovei: I just asked him about it before and he said he did not tell him that. Now I am asking him to refresh his memory.

By the Court:

Q. Did Malinski ever tell you the make of hat that he had at the time when he said he got the hat for a present? A. No, sir. 1455

By Mr. Solovei:

Q. Didn't he say something about a "Moe Penn" hat? A. No, sir.

Q. In any event, this hat that is marked Defendants' Exhibit C for identification, is something like the hat that you say you saw him wear, is that correct? A. Yes, sir.

Q. And you don't know just which Saturday it was that you claim he went out around 7 or

1456 *Virginia Goonan—For People—Direct*

8 o'clock, or around that time, 7 o'clock, and did not return until after you left? A. No, sir.

Mr. Solovei: That is all.

By Mr. McGough:

Q. As far as you know, he may have never come back? A. That is right.

Mr. McGough: That is all.

1457 Mr. Geoghan: No questions on behalf of Indovino.

Mr. Carabba: None on behalf of the defendant Rudish.

VIRGINIA GOONAN, residing at 1327 Amsterdam Avenue, Manhattan, New York City, called as a witness in behalf of the People, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

1458

Direct examination by Mr. McGough:

Q. How old are you? A. 23.

Q. Are you known as Jean? A. Yes.

Q. Do you know the defendant Morris Malinski? A. Yes.

Q. Under what name did you know him? A. Moish.

Q. Now in February 1941, were you his girl? A. Yes.

Q. Do you recall the night of February 15, 1941? A. Yes.

Q. Where were you living at that time? A. 231 East 10th Street.

Q. Manhattan? A. Yes, Manhattan.

Q. And what was the name of the people you were living with? A. Di Pisa.

Q. Man and wife? A. Yes.

Q. Were they related to Malinski, if you know? A. Shirley was his sister—

Q. Take your time and talk up. A. Moish and Shirley were brothers and sisters.

Q. And who is Shirley, please? A. Morris' 1460
sister.

Q. And who is she, please, at the house; was she married to anybody? A. She was married to Pete Di Pisa.

Q. Her name was Shirley Di Pisa? A. Yes, sir.

Q. And you were living there at that time? A. Yes, sir.

Q. How long had you been there that night? A. I was staying there three weeks.

Q. A couple of weeks? A. Yes.

Q. Now did something happen that night that made an impression upon your mind? A. (No 1461
answer.)

Q. Did you hear me? A. Yes.

Mr. McGough: Will you repeat the question, please?

(The question was repeated by the stenographer.)

Mr. Solovei: I object to the form of the question.

The Court: Objection overruled.

Mr. Solovei: Exception.

1462

The Court: Say "Yes" or "No".
The Witness: Yes.

By Mr. McGough:

Q. Did you see Morris Malinski there at that house that night? A. Yes.

Q. What time was it? A. About 2:30 or 3 o'clock.

Q. A. M. or P. M.? A. A. M.

1463

Q. Do you recall what night of the week it was? A. On a Saturday.

Q. Now what was the first thing that attracted your attention that night? A. The bang on the door.

By the Court:

Q. Was that Saturday night or early Sunday morning? A. Early Sunday morning.

Q. Early Sunday morning? A. Yes.

By Mr. McGough:

1464

Q. And did the banging on the door wake you up? A. Yes.

Q. Did you see anybody come to the door? A. Yes.

Q. Who? A. Shirley.

Q. Would that be Morris Malinski's sister? A. Morris' sister.

Q. And where was Peter Di Pisa at the time? A. He was in the bedroom.

Q. How many rooms are in that flat or apartment? A. There is three.

1465

Q. And the door coming into the hall, what room does that enter into? A. The kitchen.

Q. Did you get up from your bed? A. Yes.

Q. What did you do? A. I went to the kitchen.

Q. Did you hear anything that was said between Morris Malinski and his sister Shirley? A. Yes.

Q. What did you hear?

Mr. Carabba: If your Honor pleases, at this time may I respectfully interrupt and address myself to the Court?

1466

The Court: Yes.

Mr. Carabba: I ask your Honor to instruct the jury that whatever was said by this witness and the defendant Malinski's sister is not binding upon the defendant Rudish.

Mr. Geoghan: The same on behalf of the defendant Indovino.

The Court: The jury is so instructed. The same instruction is given with reference to Indovino. This testimony is received only with reference to Malinski.

1467

By Mr. McGough:

Q. Now tell us what you heard, please. A. He banged at the door and Shirley got up and oponed the door and he asked her could he stay there for the night. She said there was no room. He says, "We just shot a cop". So Shirley's husband got up and pushed him out of the door, pushed him out into the hall. He said that he didn't want him in the house; he didn't want no trouble.

1468 Q. Now did you hear Morris Malinski say anything else besides staying there that night and shooting a cop? A. I heard him say, "We each got $200 apiece".

Q. What did you do when you heard that? A. I got up off the couch and I went to the kitchen and I says, "What did you do; shoot a cop"?

Q. Who did you say that to? A. Morris.

Q. Malinski? A. That is right.

Q. And did he say anything? A. He said,
1469 "Get back in bed before I give you the same thing I gave the cop".

Q. He said that to you? A. That is right.

Q. Do you know this defendant Indovino? A. Yes.

Q. Do you know him under any other name? A. Tiger.

Q. How many times have you met Tiger Indovino? A. Six times.

Q. And how did you first come to meet him? A. Through Morris.

Q. Morris Malinski? A. Morris Malinski.

Q. And where were you at the time you made
1470 Tiger Indovino with Morris? A. In Max's—

Mr. Geoghan: I object to it on the ground it has no connection with this alleged crime.

Mr. McGough: I have a right to show the acquaintanceship.

The Court: He has a right to show acquaintanceship between them. Of course I do not know when the acquaintanceship started, the day or time when it was made, but he has the right to show the acquain-

tance. We will see when the alleged acquaintance was made, if it can be ascertained.

Mr. Geoghan: Does your Honor overrule my objection?

The Court: Your objection is overruled, Mr. Geoghan.

Mr. Geoghan: Exception.

The Court: I recall that you opened to the jury and you said that they did not even know each other. 1472

Mr. Geoghan: I said that as to Rudish.

The Court: As to Rudish?

Mr. Geoghan: Yes.

The Court: I beg your pardon, Mr. Geoghan. Your objection is overruled, though.

Mr. Geoghan: Exception.

The Court: Put the question to her again.

By Mr. McGough:

Q. Where did you meet Indovino and Morris? 1473
A. In Max's 5 and 10 cent store.

Q. Where? A. 14th Street and First Avenue.

Q. How far from the store were you living at that time? A. Right across the street.

Q. Can you fix the time that it was that you met Indovino; what month, what year? A. It was in November or September.

Q. November what? A. (No answer.)

Q. What year? A. 1940.

Q. Was that the first time? A. Yes.

Q. And can you tell us the month that it was

1474 the last time that you saw him? You say you saw him about six times? A. Yes.

Q. When was the last time you saw Indovino and Malinski?

The Court: You mean, together?

By Mr. McGough:

Q. Together. A. (No answer.)

1475 Q. About when, approximately? A. I think it was the first two weeks in January 1941.

Q. Was anything said when you first met Indovino?

Mr. Geoghan: I object to the form of the question.

Mr. McGough: Withdrawn.

The Court: Proceed.

By Mr. McGough:

1476 Q. You say you met Tiger through Malinski? A. That is right.

Q. Did Malinski say anything to you at that time? A. He says, "I want you to meet a friend of mine. This is Tiger."

Q. Did Tiger say anything to you? A. He just said, "How-do-you-do".

Mr. McGough: All right; your witness.

Cross-examination by Mr. Solovei:

Q. You lived with Slip for a while, didn't you, Virginia? A. What?

Q. Didn't you live with Slip for a while in one apartment? A. No.

Q. What? A. No.

Q. How friendly are you with Slip? A. I know him through Morris.

Q. You are very friendly with him, aren't you? A. Not very friendly.

Q. Didn't you live in one apartment with Slip? A. No.

Q. Don't shake your head, please; just answer. A. No. 1478

Q. Did you go out with him often? A. No.

Q. Never went out with Slip? A. I went out with Morris.

Q. How about Slip? A. No.

Q. You liked Slip, didn't you? A. No.

Q. Did you meet Slip at the Citadel Club? A. Where?

Q. At the Citadel Club? A. (No answer.)

Q. Some club on the East Side? Did you meet him there? A. I went up to one club one night with Morris.

Q. Was Slip there? A. I think Slip was up there. 1479

Q. Did you meet Yellin, Dave Yellin, Slip's friend? A. No, never heard of him.

Q. And when did you first meet Morris? A. That was in the summer.

Q. 19—what? A. 1940.

Q. 1940? A. Yes.

Q. Where did you meet him? A. In the 5 and 10, in Marks' 5 and 10.

Q. And then did you go out with him? A. Yes.

Q. How often did you go out with him? A. Once or twice a week.

Q. And did you go out to some apartments with him? A. Yes.

Q. Did you live together? A. No.

Q. What? A. No.

Q. Did you ever stay at these apartments overnight with him? A. No.

Q. What apartments did you go with him? A. Well, I was with my sister. Then from there,

1481 I went to his sister's.

Q. Did you ever talk to Slip about this case? A. No.

Q. Did you ever talk to Yellin about this case? A. No, I don't know him.

Q. You don't know Yellin? A. No.

Q. Do you know Red the Tippler? A. No.

Q. Do you know Beitler? A. No.

Q. When was it that you first met Slip in 1940? Was it in the summer? A. That was in the summer.

Q. And you went out with him for some time, on and off? A. I did not go out with Slip.

1482

Q. I mean Malinski. A. With Morris; that is right.

Q. You went out with him on and off? A. Yes.

Q. A couple of times a week? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. When was this that you were over at Miss Shirley Di Pisa's house? A. I was there in January.

Q. And you stayed there for about a week or two? A. Three weeks.

Q. Stayed there for three weeks in January? A. Yes.

Q. And that was the last time you were there? A. That is right. That was the last time I saw Morris and Slip.

Q. That was in the month of January 1941, is that right? A. That is right.

Q. And after that, you never saw him again? A. That is right.

Q. Is that correct? A. Yes.

Q. Now of course you know that New Year's comes around January 1941, is that right? A. That is right. 1484

Q. And it was for about three weeks in the month of January 1941 that you stood at Mrs. Di Pisa's house; what is her name, Malinski's sister's house? A. That is right.

Q. And you did not see him after that at all?

The Court: There are several questions in there. We will take them one at a time.

Mr. Solovei: All right.

By the Court:

Q. When was it that this is supposed to have happened? 1485

Mr. Solovei: I object to the question.

The Court: Your objection is overruled.

Mr. Solovei: I ask that I be permitted to ask the witness—

The Court: You shall be permitted to, but I want to understand myself what the witness claims.

Mr. Solovei: Won't you let me bring it out?

1486 *Virginia Goonan—For People—Cross*

The Court: I will permit you to do it. When did you say that this episode occurred at night, including the banging at the door?

Mr. Solovei: I object to the question.

The Court: Your objection is overruled.

Mr. Solovei: I except.

By the Court:

1487 Q. When was it? Was it in January or in February or in March or in April? A. That was January 15th.

Q. Was it January 15th? A. That is right.

The Court: All right.

Mr. Solovei: I move to strike out all her testimony.

By the Court:

Q. Are you certain it was on January 15th? Are you certain of the month? A. Yes.

1488 Q. What? A. It should be January.

Q. It was January; you are sure of the month?

Mr. Solovei: Your Honor, I object to it upon the ground that the witness has answered four times and she told your Honor—

The Court: The record does not show the conduct of the witness on the witness-stand. The record does not disclose that.

Mr. Solovei: Her conduct certainly is not induced by any—

1489

The Court: I do not want to make any comment about it unless counsel desires to put me on the record as to what I am observing, because it is for the jury to observe, too; but let us not go any further into that.

Mr. Solovei: Exception.

By the Court:

1490

Q. When was it you want to live at the sister's house; in January? A. That is right.

Q. What part of January did you go to live at the sister's house? A. That was before the end of December; toward the end of December, and I stood there for three weeks, and I got out the following Monday.

Mr. Solovei: May I have the answer read?

The Court: Read it.

(The last answer was repeated to Mr. Solovei.)

1491

Mr. Solovei: I now renew my motion.

Mr. McGough: Are you finished cross-examining?

Mr. Solovei: I am making my motion to the Court.

The Court: I will reserve decision on the motion.

Mr. Geoghan: The same motion on behalf of Indovino.

The Court: That is entirely unnecessary because this testimony in nowise affects either Indovino or Rudish. I am

1492 *Virginia Goonan—For People—Redirect*

happy to make these continuous statements in order to emphasize to the jury the rule of law, that where evidence is received against one defendant, it has no bearing on the other defendants, and I will keep on emphasizing that throughout the trial, so that there should not be any possible question in the jury's mind as to that.

Mr. Carabba: That is satisfactory.

1493 *Redirect examination by Mr. McGough:*

Q. Did you have a baby that year? A. The baby was born 1941.

Q. Can you hear me? A. Yes.

Q. Listen and pay attention. A. Yes.

Q. Did you have a baby in 1941? A. Yes.

Q. What day was the baby born? A. May 10th.

Q. Was there anything unusual about that baby being born on that day?

1494 Mr. Solovei: I object to it.

Mr. McGough: I have a right to show dates and I have a right to show this.

The Court: You have a right to rehabilitate the witness.

Mr. McGough: Certainly, and I intend to do it.

The Court: If you can.

Mr. McGough: With your Honor's permission.

The Court: But I don't know what this witness is going to say, and I hope it is

not going to be anything to cause any grounds for a mistrial.

Mr. McGough: I am jealous of the rules. I know my rights.

The Court: Proceed.

By Mr. McGough:

Q. Now I ask you about the baby. By the way, how old is this baby now? A. Two years and one month.

Q. Was it a normal baby? A. A premature baby. 1496

Mr. Solovei: I object to this line of testimony.

The Court: Objection overruled.

Mr. Solovei: Exception.

By Mr. McGough:

Q. How much premature? A. A seven-month baby.

Q. That baby was born on May 10, 1941? A. Yes. 1497

Q. A seven-month baby? A. That is right.

Q. Can you figure how far back from May 10th it was that you had a conversation with Malinski about that baby?

Mr. Solovei: I object to it.

By Mr. McGough:

Q. Did you understand me? A. I was about three months—

Mr. Solovei: Will your Honor rule on my objection?

By Mr. McGough:

Q. If you don't understand me, have me read it back to you.

Mr. Solovei: I made an objection and I would like to get a ruling.

The Court: Do not give us the substance of the conversation. You may state if that refreshes your recollection as to the date when you had the conversation. The objection is overruled.

Mr. Solovei: Exception.

Mr. McGough: Repeat the question.

(The question was repeated to the witness by the stenographer.)

By Mr. McGough:

Q. How many months before? A. Well, I was three and a half months pregnant.

Q. At what time? A. I don't get what you mean.

Q. You were three and a half months pregnant what date in 1941?

Mr. Solovei: I object to it. She never said anything about 1941.

The Court: That is right.

By the Court:

Q. You say the baby was born in May? A. 1941.

Q. When were you three and a half months pregnant, in what month and in what year were you three and a half months pregnant? A. I was pregnant in October.

Q. Not when you were pregnant in October. When were you three and a half months pregnant? A. January or February.

The Court: Proceed.

By Mr. McGough:

Q. January or February? A. Yes.

Q. Is that right? A. Yes.

Q. Well, now, can you tell us when it was, on what Saturday and what month, please, your best recollection, that it was that Malinski came to Shirley's house?

Mr. Solovei: I object to the question.
The Court: Objection overruled.
Mr. Solovei: Exception.

By Mr. McGough:

Q. Do you understand that? A. That was on a Saturday.

Q. Can you tell us, Virginia, what Saturday it was that this happened up at Shirley Di Pisa's house?

Mr. Solovei: I object to that.

By Mr. McGough:

Q. What particular month, and if you know, what particular day of the week? A. That was—

Mr. Solovei: I object to it upon the ground that she has answered my question and your Honor's questions at least four or five times.

The Court: Objection overruled.

Mr. Solovei: Exception.

The Witness: That was in the month of January. It was on a Saturday.

By Mr. McGough:

Q. Are you sure it was January?

The Court: May the record show that the witness' lips are moving silently, and her fingers are moving as well, and that a pause is taking place of considerable length. Now don't be nervous, Miss, and just think of the question and give us an answer.

Q. Do you want to have the question read again? Do you know what the question is? A. No.

Mr. McGough: Will your Honor have the Reporter read it to her?

The Court: Read it to her, please.

(The question was repeated by the stenographer.)

The Witness: I know it was on a Saturday, late that Saturday morning, at 2:30 and 3 a. m. in the morning.

By Mr. McGough:

Q. Was it a warm night or cold night? A. It was a cold night.

Q. How do you remember that?

Mr. Solovei: I object to the question.

The Court: Objection overruled.

Mr. Solovei: Exception.

The Witness: I was sleeping on the couch and I asked Shirley for an extra blanket.

Mr. Solovei: I object to that.

The Court: Objection overruled.

Mr. Solovei: Exception.

By Mr. McGough:

Q. Did you get an extra blanket? A. Yes.

Q. Now with that in mind, can you tell us what month it was? A. February 15th.

Q. Are you sure of that?

Mr. Solovei: Will your Honor note the time that it took this witness, at least over five minutes, to make the answer to that question.

Mr. McGough: My recollection is that it was not five minutes.

The Court: It is not five minutes, but I will say for the record that the witness has been moving her lips, and the Court observed her fingering one hand with the thumb, as if counting something. That is clear. I don't know whether counsel

observed it, but I observed it here as I sat beside her.

Mr. Solovei: I renew the motion to strike out the testimony.

The Court: No, that is for the jury. The motion is denied.

Mr. Solovei: Exception.

The Court: The jury will pass on her credibility as it will on the testimony and credibility of each and every witness. The Court is not passing on credibility. That is the jury's function.

Recross-examination by Mr. Solovei:

Q. Miss Goonan, you said that you were pregnant in October 1940, is that right? A. That is right.

Q. And it was about three months or three and a half months that this occurrence tha you relate, the banging at the door and something happening; is that correct? A. Yes.

Q. And it was about three and a half months that you were pregnant, is that right? A. Three and a half to four months.

Q. Is that right? A. Yes.

Q. The Judge observed you trying to count with your fingers. Were you moving your fingers to try to count the months? A. Yes.

Q. Is that right? A. Yes, I was thinking of it.

Q. October, November, December, is that correct, would be three months, is that right? A. Yes.

Q. And January would be about four months, is that right? A. Yes. It was not the beginning of October.

Q. What? A. It was almost the end of October when I was pregnant.

Q. It was towards the end of October? A. Yes.

Q. So it would be around January or towards the end of January that you were over at Shirley's house, is that right? A. That is right.

Q. Is that right? A. Yes.

The Court: You mean four months after the end of October is January? Is that what you contend?

Mr. Solovei: I say October, November, December and January.

The Court: The end of November would be one month, wouldn't it?

Mr. Solovei: Yes.

The Court: The end of December would be two months. The end of January would be three months; and three and a half months would be some time in February, and four months would be the end of February. Am I correct or incorrect? But you ask the witness.

Mr. Solovei: Let me see if I can straighten her out.

The Court: Proceed.

By Mr. Solovei:

Q. You said that you went to live at Shirley's house sometime in December shortly after Christmas, didn't you say that? A. Yes, sir.

Q. And you stayed there for about three weeks? A. Yes, sir.

Q. Am I right? A. Yes, sir.

Q. So that you left Shirley's house towards

the end of January of 1941, is that right? A. Yes.

Q. And you did not see Malinski after that, is that right? A. That is right.

Q. Now you are sure about that? A. Yes.

Q. You cannot be mistaken about it? A. No.

Q. And the reason why you are sure about it is because it was after Christmas or shortly after Christmas that you went over to Shirley's house to stay with her? A. Yes.

1517 Q. Is that right? A. Yes.

Q. And you only remained there for three weeks? A. Yes.

Q. So you stayed there until about the middle or towards the end of January of 1941, is that right? A. I got out on the following Monday.

Q. What? A. I got out on the following Monday.

Q. It was in January 1941 anyhow, is that right? A. Yes—

Q. Is it right?

1518 Mr. McGough: Wait a minute; let her answer.

The Court: Please don't shout at the witness.

Mr. Solovei: I won't.

The Court: You have been shouting at the witness. Please do not do that.

By Mr. Solovei:

Q. You understand my question? A. I think I got out in February.

Q. Got out when? A. February.

Mr. Solovei: Will you stop laughing and snickering?

Mr. McGough: Gee, I can't help it.

Mr. Solovei: There is a man's life at stake.

Mr. McGough: I object to these remarks and I am going to ask your Honor to have counsel advance back to where he belongs. He is leaning over here and the poor girl is not even given a chance to answer.

Mr. Solovei: It has not come to the time yet that you are running the courtroom.

Mr. McGough: I did not want to give that impression. I do not think anybody has it outside of him. I am going to ask your Honor to have him stand back at his own counsel table. Can we have a glass of water for the witness, too?

Mr. Solovei: Do you want a glass of water?

The Court: Well, now, Mr. Solovei, we have gotten along famously in this trial. Everybody has been so nice and so peaceable. I will let Mr. Solovei stand where he is, I will not order him to retreat but I am going to ask him not to shout at the witness.

Mr. Solovei: And I will try to do that.

The Court: I know you do not do it intentionally.

Mr. Solovei: Of course not; I will do that.

The Court: But please do not shout

at the witness. It tends to confuse her and rattle her.

By Mr. Solovei:

Q. Now, Miss Goonan, I asked you before whether or not you went to Shirley's house, Malinski's sister's house, around Christmas of 1940, and you said yes, is that right? A. Yes.

Q. Will you please listen to me very carefully so that we can understand each other and you do not get confused. Will you do that? A. Yes.

1523

Q. And you stayed at her house, Shirley's house, for about three weeks, isn't that right? A. I was there longer than that.

Q. Now you say you were there longer than that? A. That is right, because I was there February 15th.

Q. Why do you say you were there February 15th? Who told you something about February 15th, Miss? A. Nobody.

1524

The Court: I am going to permit counsel to go into this fully because the witness is apparently giving two different dates. He may go into that.

By Mr. Solovei:

Q. Who told you that? A. Nobody.

Q. Who told you about something on February 15th? A. Nobody.

Q. Didn't somebody talk to you as to some-

thing that happened on February 15th? A. It was when Morris Malinski came up.

Q. Didn't some detective talk to you? A. No.

Q. What? A. No.

Q. No detective spoke to you? A. No.

Q. You never spoke to any detective? A. I never spoke to no detective up until two detectives come up where I worked and picked me up.

Q. When? A. Two weeks ago.

Q. Was that the first time you ever spoke to him?

Mr. McGough: Wait a minute; she did say she spoke to him.

The Court: She said they came up there and picked her up.

By Mr. Solovei:

Q. Did you talk to them when they picked you up? A. No.

Q. Where did they take you? A. Took me to the D. A.

Q. What D. A.? A. Mr. McGough.

Q. And in there you spoke to Mr. McGough, didn't you? A. And Mr. Van Ness.

Q. What? A. Mr. Van Ness.

Q. This man here (indicating)? A. Yes.

Q. And before you spoke to them, did you talk to the detectives? A. No.

Q. You never had any conversation with them at all? A. No.

Q. They never said anything to you? A. No.

Q. No detectives at all? A. Well, the first time—

Q. Never said anything to you at all? A. That is the first time I saw them was when they came up where I worked.

Q. Who was the first one that told you something about February 15th? A. Well, that is when Morris come up, February 15th.

Q. Who told you about February 15th? Did Mr. McGough tell you about February 15th? A. Well, he told me—he told me he wanted to know if I really know what I was up there to his office.

1529 Q. Did he tell you about February 15th, he or Mr. Van Ness? A. They told me that there was a cop shot.

Q. They told you a cop was short on a certain date, is that right? A. That is right.

Q. And do you now remember whether it was February 15th that they told you? A. Yes.

Q. And that is why you now change your statement from January to February 15th because you were told by Mr. McGough and Mr. Van Ness— A. No.

1530 Q. —that it was February 15th that it happened, isn't that so?

Mr. McGough: That is objected to.

The Court: She says "No".

The Witness: I told you I was four months pregnant when it happened.

By Mr. Solovei:

Q. What? A. I was four months pregnant when it did happen.

By the Court:

Q. In other words, you fix the date when this rapping on the door happened by the fact that you were about four months pregnant at that time? A. Yes.

By Mr. Solovei:

Q. Were you ever married? A. No.

Q. Do you remember what I asked you before when you left Malinski's house and you said January 15th, do you remember that? A. Yes.

Q. And you remember when I asked you when you got there, and you said sometime around—I don't mean Malinski's house—I mean his sister's house, do you understand that? A. Yes, sir.

Q. A little while ago I asked you when was it you arrived at Mrs. Di Pisa's house, Malinski's sister, and you said sometime around Christmas of 1940? Do you remember that? A. Yes, it was a couple of days before New Year's.

Q. A couple of days before New Year's would make it almost around Christmas? A. Yes.

Q. Was it before Christmas? A. Yes—no, I think it was a day after Christmas.

Q. A day after Christmas? A. Yes, because Christmas I was down at my sister's.

Q. Now when I asked you if you got there around Christmastime of 1940, to Mr. Di Pisa's house, that was the truth, wasn't it? A. Yes.

Q. When you said yes? A. Yes.

Q. And when you said you only stayed there for about three weeks and left around January 15, 1941, that was so, isn't that so? A. No, I made a mistake then.

Q. You made a mistake then? A. Yes.

Q. Did the District Attorney refresh your recollection because of the fact that he told you—A. No.

Q. —what happened on the 15th? A. Now I am positive because I was four months pregnant.

Q. Did you ever talk to Spielfogel about it? A. No.

Q. Before you came to the District Attorney's office to talk to him about this case, did you ever tell anybody in the world about what you just testified to here? A. I didn't know anything about it, no.

Q. You didn't know a thing about anything, did you? A. Well, I knew what happened that night but I didn't say nothing.

Q. A minute ago you said you didn't know anything at all about it? What did you mean by that? A. I mean I knew about the shooting but I didn't say anything.

Q. When did you know about the shooting? A. When he came down and told his sister.

Q. When was that? A. February 15th.

Q. Who told you it was February 15th?

Mr. McGough: That is objected to as already asked and answered.

The Court: Objection sustained.

Mr. Solovei: Exception.

The Witness: It was a cold night that night—

By Mr. Solovei:

Q. Well, all Februaries are cold nights, aren't

they? A. And he promised to take me to the show that Saturday and it was that Saturday he didn't come at all.

Q. That Saturday he promised you to take you to the show? A. Yes.

Q. Did you ever go to a show before? A. Yes.

Q. You did go to shows before? A. Yes.

Q. And when did you see him that Saturday? What time was it that you saw him on Saturday? Did you see him on Saturday at all? A. No, when he come back and he banged on the door, that was the only time I saw him.

Q. When did you see him before that Saturday? A. Four days before that.

Q. What? A. A couple of days before that.

Q. What day of the week was it that you saw him before Saturday? A. It was in the middle of the week.

Q. The middle of the week of what month? A. A week before this happened.

Q. What month was it? A. February.

Q. And what day was it that you met him or you saw him? A. I don't know the date.

Q. What? A. I don't remember the day but it was during the middle of the week.

Q. Was it in the middle of the week? A. That is right; I think it was Wednesday or Tuesday.

Q. On Monday or Tuesday? A. Wednesday or Tuesday.

Q. Where did you see him? A. Down the store.

Q. Well, now, can you tell us what day of the

month it was that you saw him before this day that you are talking about? A. February.

Q. What month was it? A. February.

Q. What day of the month? A. The day before it happened.

Q. The day before what happened? A. Before they shot the cop.

Q. The day before they shot a cop, you saw him? A. Yes.

Q. You just told us a little while ago you only
1541 saw him a couple of days or a week before that, isn't that so? A. I didn't say a week before; I said a couple of days.

Q. How many days did you say? A. I said a couple of days.

Q. A couple of days? A. I said either Tuesday of Wednesday.

Q. Tuesday or Wednesday? A. Yes, sir.

Q. And now you say that you saw him a day before this happened, is that right? A. That is right.

Q. And that would make it Tuesday or
1542 Wednesday, is that right? A. No.

Q. Don't shake your head. A. No.

Q. Didn't you just say you saw him Tuesday or Wednesday? Didn't you just say that? A. I saw him Tuesday or Wednesday.

Q. And didn't you also just say that you saw him a day before it happened? Didn't you just say that? A. I must have made a mistake.

Q. You made another mistake? A. Yes.

Q. Is that another mistake? A. (No answer.)

Q. What?

The Court: I think we will take a recess now for a few minutes.

Mr. Solovei: Will you keep this witness up here?

The Court: Yes, I will keep her up here. Gentlemen of the jury, do not discuss the case among yourselves. Keep your minds open.

(A short recess was declared after which the trial was resumed.) 1544

VIRGINIA GOONAN, resumed.

Cross-examination by Mr. Solovei (continued):

Q. You told us I think in the last question I asked you there just before that, that the time you saw him before this day in question was on a Tuesday or Wednesday; is that right? A. Yes. 1545

Q. Is that right? A. Yes.

Q. Now won't you— A. I said that but it was a mistake. I didn't see him then.

Q. You made a mistake? A. Yes, sir.

Q. And you corrected it later on and said it was Friday, is that right? A. It was on Friday.

Q. Was it on Friday? A. Yes.

Q. Do you know what day of the month it was? A. The 14th.

Q. The 14th of what? A. February.

Q. Now did you think it was the 14th, Miss? A. Yes.

Q. Now you said in answer to the Judge's question and in answer to the District Attorney's question that you were between three and a half or four months gone, I mean pregnant, is that right? A. That is right.

Q. It could not be over four months, could it? A. That I would not know.

Q. What? A. That I wouldn't know if I was over four months.

Q. You wouldn't know? A. I know I was in
1547 the fourth month.

Q. You are just guessing at it, is that right? A. That is right.

Q. And you told me that it was right after Christmas or the day after Christmas that you came to Mrs. Di Pisa's house, is that right now? A. Yes, that is right.

Q. And you know that because on Christmas Day you were at your sister's house, is that correct? A. That is right.

Q. So that you were at Mrs. Di Pisa's house around December 25th or December 26th, is that fair? A. Yes.
1548

Q. What? A. Yes.

Q. And you did not stay at Mrs. Di Pisa's house longer than three weeks, is that right? A. I stood there longer than that.

Q. Well, how much longer did you stay? A. Well, I was there up until the 16th of February.

Q. The 16th of February? A. That is right.

Q. You remember telling us that you were there about three or four weeks?

The Court: We have been over that,

haven't we? Would you like to go over it again?

Mr. Solovei: Yes.

The Court: You may.

Q. Were you mistaken about that? A. Yes, I was thinking of my sister's house.

Q. What? A. I was thinking of my sister's house. I was with her for three weeks.

Q. You were thinking of your sister? A. Wait a while—that is right.

1550

Q. When did you go to your sister's house? A. I was staying there before I went to Di Pisa's house.

Q. When did you go back to your sister's? A. I did not go back to my sister's.

Q. Where did you go? A. 1491 Amsterdam Avenue.

Q. When did you start in living at 1491 Amsterdam Avenue? A. Right after I left—when I left on the 16th.

Q. Did you have an apartment there? A. That is right.

1551

Q. Did you rent an apartment there? A. It did not belong to me. It belonged to Mr. Goonan.

Q. Mr. Goonan? A. That is right.

Q. Who is Mr. Goonan? A. Do I have to answer that? That is the baby's father.

Q. Did Mr. Goonan live there? A. That is right.

Q. Does Mr. Goonan live there? A. That is right.

Q. He still lives there? A. He is still there.

Q. Was that the first time you ever lived at this Amsterdam Avenue address? A. Yes.

Q. You still live there? A. Not the same house. I have my own apartment now.

Q. Well, will you tell me where you lived on February 15th of 1941? A. I first was up in Vernon Boulevard, Long Island City.

Q. When were you at Vernon Boulevard? A. That is right. That is the first time Mr. Goonan had his apartment there. From there we moved to Amsterdam Avenue.

Q. When were you at Vernon Boulevard? A.
1553 February.

Q. What address? Can you give us the street number, Miss? A. It is Vernon Avenue between 4th and 5th—I just don't remember the address.

Q. Is that Long Island City? A. That is right.

Q. It is Long Island City? A. Yes.

Q. And the apartment was in the name of Goonan? A. That is right.

Q. What is his first name? A. That was not his apartment. That was a furnished room. Mr. William Goonan.

Q. What? A. Mr. William Goonan.

1554 Q. Mr. William? A. That is right.

Q. Goonan? A. Yes, that is right.

Q. That was a furnished room house? A. That is right.

Q. Do you know what day of the month you went there? A. February.

Q. What day of the month? A. The 16th.

Q. You went there February 16th? A. 16th or 17th.

Q. What? A. Either the 16th or 17th; I just can't furnish the date.

Q. Do you know what year? A. 1941.

Q. And this furnished room. was it on the first,

second or third floor? What floor was it? A. One flight up.

Q. Front or rear? A. Front.

The Court: How much longer do you expect to take, Mr. Solovei? I just want to govern myself for the rest of the afternoon.

Mr. Solovei: I will be through very shortly.

The Court: About how long? 1556

Mr. Solovei: I don't think I will be more than five or six or seven minutes.

The Court: All right, proceed.

By Mr. Solovei:

Q. And this 1327 Amsterdam Avenue, is that where you live now? A. Yes.

Q. And how long did you live at this address at Vernon Boulevard between 4th and 5th Avenue? A. We were there a couple of months. From there we went to 1491 Amsterdam.

Q. And what is your name, Miss? A. Well, I 1557
am going under the name of Goonan.

Q. What is your true name? A. Natale.

Q. Natale? A. Yes.

Q. What is your sister's name? A. Rachel.

Q. Rachel? A. That is right.

Q. Rachel what? A. Jorr.

Q. Jorr? A. Yes.

Q. And where does she live, Miss? A. I would not know.

Q. You don't know? A. That is right.

Q. Where did she live in 1940? A. She lives up in 14th Street and First Avenue.

Q. Where did she live in 1941? A. That I would not know, in 1941. She still lives up on 14th Street and First Avenue.

Q. Brooklyn? A. No, New York, on the East Side.

Q. Do you know the number of the street? A. 14th Street and First Avenue.

Q. That is a big block. A. It is right across the street from where Morris used to work. I just don't remember the number.

1559 Q. Across the street from where he worked? A. That is right.

Q. He did not work on 14th Street? A. Yes, he did.

Q. Wasn't it 10th Street? A. 14th Street.

Q. On 14th Street? A. That is where I met him; that is right.

Q. You don't know the house number? A. No.

Q. You are peeved at Morris, aren't you, because he did not marry you? A. No.

Q. What? A. No.

Q. Aren't you sore at him for that reason? A. No.

1560

Q. You are not sore? A. I mean, I left.

Q. You left what? A. I left his sister's house when I found out what he done.

By the Court:

Q. You what? A. And when he come down and he said he shot a cop.

By Mr. Solovei:

Q. Who told you to say that? Did somebody tell you? A. Nobody.

Q. Some of the cops told you to say it? A. Nobody did. I did.

Q. And you never told a soul in the world other than Mr. McGough about this case, is that right? A. That is right.

Q. Nobody had your name and address or where you lived or anything at all, is that right? A. As far as I know, no.

Q. Spielfogel did not have it? A. No.

Q. And Yellin did not have it? A. I don't know him. 1562

Q. You don't know him? A. No.

Q. You never gave your name or your address to anybody at all and you were living under the name of Goonan, is that right? A. That is right.

Q. Where did they come to talk to you, the police officers? Where did they get you from? A. They picked me up off my job.

Q. Where? A. 34th and Fifth; F. W. Woolworth & Company.

Q. And did you ever tell anybody that you were Mrs. Goonan or your name was Goonan and that you knew about this case and that you worked in Woolworth's? A. No, those two detectives they come up and pick me up off my job. 1563

Q. You don't know how they found out anything at all about you, is that it? A. That is right. I didn't know until they came up after me.

Q. What? A. I didn't know anything until they come up after me.

Q. And that is the first time they did come up after you was how long ago, did you say? A. Two weeks today.

Q. What month was it? A. June; two weeks from today.

Q. Why did it take you so long to answer that question? A. I told you that before; they picked me two weeks ago today and you are repeating the question.

Q. And it was in the month of June, is that it? A. That is right.

By the Court:

1565

Q. Did they take you right out of the store? A. Yes, it was June 3rd.

The Court: June 3rd, she says. Are there any questions by either of the other counsel?

Mr. Carabba: No questions.

Mr. Geoghan: No questions on behalf of Indovino.

By Mr. McGough:

1566

Q. Was it the day after that you heard Malinski say this about the cop that you went to Vernon Avenue? A. That is right.

Q. You said it was February 16th? A. That is right.

Mr. McGough: All right.

The Court: Step down.

Mr. McGough: Now I will call Mr. Di Pisa.

Pietro Di Pisa—For People—Direct 1567

PIETRO DI PISA, residing at 314 East 3rd Street, Manhattan, New York City, called as a witness in behalf of the People, and being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Do you know Morris Malinski? A. Yes, sir.

Q. Are you related to him? A. Yes, sir. 1568

Q. How? A. I married his sister.

Q. You married his sister? A. Yes.

Q. And what is her name? A. Shirley Malinski.

Q. Now in February, 1941, where were you living? A. 231 East 10th Street.

Q. Is this a photograph of the house? A. Yes, sir.

Mr. McGough: I offer it in evidence.

The Court: Show it to counsel.

Mr. Solovei: I object to it upon the ground that it is incompetent, irrelevant 1569 and immaterial.

The Court: Qualify it.

By Mr. McGough:

Q. Mr. Di Pisa, will you look at that photograph, please, and tell me whether that is a correct representation? A. Yes.

Q. Of how the house looked at the time you lived there in February 1941? A. The same thing.

Q. The same thing? A. Yes.

1570

Mr. McGough: I now offer the photograph in evidence.

Mr. Solovei: Objection.

The Court: Objection overruled.

Mr. Solovei: Exception.

The Court: The photograph may be marked.

(Photograph received and marked People's Exhibit 12.)

1571

Mr. McGough: Will your Honor permit me to pass that around to the jury?

The Court: Yes.

Mr. Meadow: Will your Honor instruct the jury that that is only as to the defendant Malinski?

The Court: Gentlemen of the jury, I instruct you that this is admitted only with reference to the defendant Malinski. I instruct you that it has no binding force upon the defendant Rudish or the defendant Indovino.

1572

By Mr. McGough:

Q. Now in February of 1941, were you living with your wife Shirley at that address? A. Yes, sir.

Q. Was there anybody else staying there with you at that time? A. His girl friend.

Q. Whose girl friend? A. Murray Malinski.

Q. What is the girl friend's name? A. Jean.

Q. Did you see that girl here today? A. Yes, sir.

Q. Now sometime in the month of February, did you read a newspaper about a policeman being killed? A. Yes, sir.

Mr. Solovei: I object to the question.
The Court: Yes or no?
The Witness: Yes, sir.
The Court: Objection overruled.
Mr. Solovei: I except.

By Mr. McGough: 1574

Q. Did you read the name of the policeman in that paper?

Mr. Solovei: I object to the question.
The Court: Objection overruled.
The Witness: Yes.
Mr. Solovei: Exception.

By Mr. McGough:

Q. What was the name of the policeman? A. Fox. 1575

Q. What paper did you read that in? A. The News.

Q. Do you remember what day of the week you bought the paper and read that? A. Sunday morning.

Q. Now did you see Malinski the night before you read about Fox in the newspaper? A. Yes, sir.

Q. Where did you see him? A. In my house.

Q. Was that at 231— A. Yes, sir.

Q. —Tenth Street, as you said? A. Yes, sir.

1576

The Court: The night before was it what, you mean, Mr. McGough?

Mr. McGough: The night before he read about the Fox case.

The Court: You mean when it was dark?

Mr. McGough: I was just about to bring that out.

The Court: He said it was on Sunday morning. The night before would be Saturday night.

1577

Mr. McGough: I am about to ask the hour.

The Court: All right.

By Mr. McGough:

Q. You say you saw him the night before—A. Yes, sir.

Q. —you read it in the paper? A. Yes.

Q. What time that night did you see him? A. It would be 1:30 to 2 o'clock in the morning.

Q. So that would be early Sunday morning?

1578

A. Yes.

Q. Were you asleep just before you saw him? A. Asleep, yes.

Q. What happened? A. He come in and knock loud on the door; knock loud, so my wife got up, got up and opened the door. I saw Malinski in the front as I w. ke up. I saw Malinski in front of the kitchen door. He said he shoot a cop in Coney Island.

Q. He said he shot a cop in Coney Island? A. "And I got $200 in the pocket".

Q. "I got $200 in my pocket"? A. Yes, sir.

Q. What else did he say? A. Then Jean was outside.

Q. Who? A. Jean.

Q. The girl? A. Was in the kitchen, so he told the girl—

By the Court:

Q. She or he? A. She.

By Mr. McGough: 1580

Q. Who is that? A. She. He says, "If you don't go back to bed there I give you the same dose as I gave the cops".

Q. Who said that? A. Murray Malinski (pointing).

Mr. McGough: Will you have that girl stand up, please?

(Virginia Goonan stands up in the courtroom.)

Q. Will you look at this young lady and tell 1581
me whether that is the girl you saw at that house? A. The girl.

Q. Is that the girl you said was called Jean? A. Yes.

Q. Indicating Virginia Goonan? A. Yes.

(Virginia Goonan leaves the courtroom.)

Q. When Malinski said that, what did you do? A. I grab the door and I told him to get the hell

out of my way, see, so he get out. He going out and I don't see no more since that time.

Mr. McGough: You may inquire.

Cross-examination by Mr. Solovei:

Q. You and Malinski had some trouble, didn't you? A. No, sir.

Q. Didn't Malinski beat you up because you were beating your wife, rather his sister? A. No, sir.

Q. What? A. No, sir.

Q. Did you have a fight? A. No, sir, I don't got nothing against Malinski.

Q. Nothing against him? A. No, sir.

Q. What time did you go to bed Saturday night? A. Saturday night, around 10 o'clock.

Q. 10 o'clock? A. Yes.

Q. Well, did you read about the Fox murder before you went to bed? A. No, sir.

Q. Did you know about the Fox case before you went to bed? A. No, sir.

Q. When Malinski came to your door of the house and knocked at your door, did you know about the Fox case then? A. No, sir.

Q. You say you read the paper next day? A. Yes, sir.

Q. What paper did you read? A. The News.

Q. You saw the News Sunday? A. Yes, sir.

Q. When was it you spoke to somebody about this case for the first time? A. I never spoke because that was in the morning. Only my wife in the morning said a cop be killed, I read in the paper.

Q. I am talking about when did you talk to

somebody of the police or anybody at all about this case for the first time? A. The first time when they pick me up on the job.

Q. The first time? A. Yes.

Q. And you spoke to the police about it? A. The first time; no, sir.

Q. What? A. No, sir.

Q. When did you talk to the police about it for the first time? A. They pick me up on the job.

Q. When they picked whom up on the job? 1586
A. Me. They pick me up.

Q. When was that? A. That was last Tuesday.

Q. Before last Tuesday— A. Yes, sir.

Q. —of this year— A. Yes, sir.

Q. —you never spoke to anybody about this case at all? A. No, sir.

Q. Is that right? A. Yes.

Q. And you didn't talk to any police? A. No, sir.

Q. You didn't talk to anybody from the District Attorney's office? A. No.

1587

Q. Is that right? A. Yes.

Q. And they just picked you up off the job and then you went over there and told them what you knew? A. Yes, sir.

Q. Is that right? A. Yes.

Q. Now who told you it was in February? A. I read it in the paper.

Q. And did you remember it since? A. Yes, sir.

Q. Did you write it down in some memorandum book? A. My wife got a piece home.

Q. What? A. My wife got the piece home.

1588 *Pietro Di Pisa—For People—Cross*

By the Court:

Q. What piece? A. The piece of paper.

By Mr. Solovei:

Q. She wrote it down on a piece of paper? A. No, the piece of paper is home.

By the Court:

1589 Q. A piece from a newspaper? A. Yes.

By Mr. Solovei:

Q. I am talking about, did you write it down? A. No, sir.

Q. The date? A. No, sir.

By the Court:

Q. Did your wife get the piece from the newspaper? A. I think so.

1590 Q. What piece from the newspaper was it? Whose paper was it? A. The News.

Q. From what day? A. The 16th or 15th.

Q. The 15th of February? A. Yes, sir.

Q. Is that the paper that you bought? A. Yes.

Q. Your wife kept the piece? A. Yes.

The Court: Proceed.

By Mr. Solovei:

Q. Your wife kept a newspaper of February 15th? A. Yes, sir.

1591

Q. You read the newspaper February 15th, is that it? A. Yes.

Q. And then the newspaper of February 15th, you saw the article in that paper, is that right? A. Yes.

Q. And that paper you kept, is that right? A. It is my wife got it.

Q. Your wife kept it? A. Yes, sir.

Q. And the only paper you saw it in on February 15th was the News, is that right? A. Yes, sir.

1592

Q. You are sure about that? A. Yes, sir.

Q. You are positive? A. Positive.

Q. Cannot be mistaken? A. No, sir.

Mr. Solovei: No further questions.

By the Court:

Q. It was a Sunday paper? A. It was Sunday morning.

The Court: All right.

1593

Mr. McGough: No questions.

Mr. Geoghan: No questions on behalf of Indovino.

Mr. Carabba: No questions on behalf of Rudish.

By Mr. Solovei:

Q. Mr. Di Pisa, you just told us it was on February 15th and you told the Judge you saw it on Sunday, is that right? A. Yes.

Q. And you cannot be mistaken about that either, can you? A. Yes.

Q. Is that right? A. Right.

1594

Q. Sunday morning, you saw it in the paper? A. Yes, sir.

Mr. Solovei: That is all.
Mr. McGough: That is all.
Mr. Solovei: Just one question.
The Court: Come back.

By Mr. Solovei:

1595

Q. Was it Sunday morning you saw it? A. Yes, sir.
Q. Sunday morning? A. Yes, sir.

By the Court:

Q. What kind of a paper was it? A. News.
Q. What was it? A. It was funny sheets.
Q. Funny sheets? A. Yes.

The Court: Step down.

1596

FRANK MAGUIRE, residing at 633—11th Street, Brooklyn, New York City, called as a witness for the People, and being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Mr. Maguire, what is your occupation or profession? A. I am a stenographer attached to the District Attorney's office, Kings County.
Q. And are you a Civil Service employee? A. I am.

Q. And are you assigned to the Homicide Division or Squad in that office? A. I am.

Q. Will you tell us the nature of your duties, please? A. Yes, sir. Whenever a homicide or a felony is committed in Kings County, it is our duty to proceed to the scene of the crime and there an Assistant District Attorney interrogates the witnesses, the victim, and suspects, and it is my duty to take down everything that is said by them.

1598

Mr. Solovei: Of course I object to this line of testimony, as incompetent, irrelevant and immaterial.

Mr. McGough: It is merely preliminary.

The Court: He is telling us what his duties are.

Mr. Solovei: I don't care what his duties are.

The Court: I do. Objection is overruled.

Mr. Solovei: Exception.

1599

The Witness: And upon returning to the office, I transcribe these minutes and I give the typewritten transcript to the Assistant District Attorney who is going to try the case. Well, when a case is reached for trial, I come to court and testify to the accuracy of those minutes.

By Mr. McGough:

Q. Now on the 27th day of October, 1942, were you present at the 62nd Squad? A. I was.

Q. Did you see the defendant Morris Malinski,

1600 who is sitting at the table there, at that time? A. Yes, sir, I did.

Q. Was Assistant District Attorney Edward Heffernan there at that time? A. He was.

Q. Did he ask certain questions of Malinski? A. He did.

Q. And did Malinski make certain answers? A. He did.

Q. And were you the stenographer that attended at that time? A. I was.

1601 Q. Did you reduce to stenographic notes the questions that were asked by Mr. Heffernan and the answers that were made by Malinski? A. I did.

By the Court:

Q. Did you do it accurately? A. I did.

By Mr. McGough:

Q. Did you do it accurately, Mr. Maguire? A. Well, with this exception, I left out two words.

1602 On checking the statement, I found two small words that had been left out.

Q. I am talking of the stenographic notes? A. The notes were accurately transcribed.

Q. Subsequent to that time, did you at my request make a typewritten record of those stenographic notes, of the questions and answers at that time? A. I did.

Q. And before coming here today, did you compare your transcript, your typewritten transcript with your stenographic notes to see if it was accurate? A. Yes, sir.

Q. Did you say something about two words? A. Yes, sir, I found two small words had been omitted.

Q. Have you corrected it on this original? A. No, I have not. It will just take a second to.

Q. Will you tell us, please, what time the questioning of Morris Malinski commenced? A. Yes, sir.

Q. And who was present, please? A. His statement commenced at 2:10 a. m.

1604

Mr. Solovei: What date is that, please?

The Witness: October 27, 1942, at 2:10 a. m., and there were present at that time besides Mr. Heffernan and myself, Acting-Captain John J. McGowan, and Detective Charles Celano of the Homicide Squad; Acting-Captain James Dowdell, of the 10th Detective District; Lieutenant James McNally and Detective John McNally of the 67th Squad; Detective George Lowe; Lieutenant George Loures of the 60th Squad, and Detective James Bell, assigned to the District Attorney's office. 1605

Q. Now, Mr. Maguire, I ask you if this is a correct typewritten transcript of the notes that you testified you made at the time Mr. Heffernan questioned Morris Malinski? A. Yes, sir, that is.

Mr. McGough: I offer it in evidence.

Mr. Solovei: I object to it.

The Court: Let me see it. Gentlemen of the jury, I am going to ask you to step

out into the hall for just a few moments. You do not have to bother going upstairs into your jury room. There are certain questions of law that we have to discuss here with which you have no concern. Do not discuss the case among yourselves and keep your minds open.

(The jury retires from the courtroom.)

The Court: Mr. McGough, I have not read this statement. I take it it may contain some reference to other defendants.

Mr. McGough: That is correct, Judge.

The Court: This statement would not be binding under any circumstances against the other defendants, Indovino and Rudish.

Mr. McGough: That is right; just against Malinski.

The Court: To make sure that the defendant Rudish and the defendant Indovino will not be prejudiced in any shape, manner or form by the reading of this statement, I am going to follow a course of conduct that I usually pursue in a matter of this kind, having the Fiola case in mind. Now, I do not know what the statement contains. I am not going to look at it, but if the statement refers to Rudish, I am going to delete the name of Rudish and substitute in its place "Mr. X". If the statement refers to Indovino, I am going to substitute in its place the letter—"Mr. Y", or any letters suggested by

counsel, or Richard Roe or John Doe, in order that neither Rudish's name nor Indovino's name be mentioned in that statement. Is that satisfactory to you, gentlemen?

Mr. Geoghan: I was going to suggest this, if you say "X" and "Y", they will know at least it refers to two different people.

The Court: That I am going to let the statement indicate; otherwise it would be 1610
unintelligible as to who "X" and "Y" are, and that is not for the jury.

Mr. Geoghan: My suggestion was that if you use the word "Blank" in each instance.

The Court: "Blank" and "Blank" might be confusing. I will use Doe or Roe or "X" or "Y" to show that he is referring to two different people, but the identities I am going to keep from the jury. That should be satisfactory to counsel.

1611

Mr. Geoghan: I do not question the accuracy of the statement.

The Court: Is that satisfactory?

Mr. Geoghan: Yes.

The Court: Is that satisfactory to you, Mr. Carabba?

Mr. Carabba: I agree with what your Honor has said and I believe that it is a fair course to pursue as long as the name of the defendant Rudish is not mentioned.

The Court: That is what I am trying

to do. That is the fair thing to do with a written confession.

Mr. Solovei: Will your Honor hear me on that point?

The Court: Yes, I will be glad to hear you; certainly.

Mr. Solovei: Of course, we challenge the confession as made within the purview of the statute, 1; and in conformity with our challenge, we intend to bring forth proof to show that the confession was not voluntarily made.

The Court: You may do so before it is received, if you choose.

Mr. Solovei: Yes.

The Court: You may do so on the voir dire.

Mr. Solovei: I will do so on the voir dire.

The Court: Then I will reserve decision on the offer. You have that legal right to introduce evidence at this time before the confession is received to establish that it was obtained in the manner prohibited by law, and if the Court finds as a matter of law that your contention is sound, then the Court will rule the confession out, or on the other hand, you may, if you choose, though you are under no duty so to do, permit the confession to go into evidence and offer this proof afterwards.

Mr. Solovei: Well—

The Court: You may pursue whatever

course you desire. You understand that, Mr. Solovei?

Mr. Solovei: I understand.

The Court: I advise you now that you are within your rights when you say you have the right to introduce at this time affirmative evidence, or you may cross-examine the witness on the stand concerning whether or not the confession was obtained in violation of law.

Mr. Solovei: Of course, cross-examining a witness would be of no avail because the evidence, after he gets through, your Honor will in all probabilities permit the confession to go in evidence. 1616

The Court: I don't know that. I am not a soothsayer. If you disclose from this witness that this defendant was intimidated in a manner described by the statute, or that a promise was made to him in the manner described in the statute, with which we are all familiar, then I will rule the confession out, if you establish that through this witness. 1617

Mr. Solovei: I told your Honor I intend to challenge the confession.

The Court: Do you wish to do so now?

Mr. Solovei: I will do so now.

The Court: Or do you wish to wait--

Mr. Solovei: I will do so now and do it again later on as my defense. I am doing it now as a question of law, strictly on the question of law.

The Court: You mean you want to do it piecemeal?

1618 *Colloquy*

Mr. Solovei: No, no, I simply now do it in conformity with the statute and as laid down by the courts.

The Court: You have the right to offer any proof you desire tending to show that this confession was extorted in the manner prohibited by law.

Mr. Solovei: That is right.

The Court: Or that the proffered confession is objectionable because of any
1619 other reason stated by the appropriate statute of the Penal Code.

Mr. Solovei: Now in reference to what your Honor is talking about deleting the name, it is also our contention on behalf of Malinski that the confession not only was extorted from him in violation of statute but also that it is false, as far as he is concerned.

The Court: Well, that is another proposition. Its truth or falsity is a matter that cannot be determined at this time.

1620 Mr. Solovei: But I am trying—I have not finished—

The Court: We will not go into that. Wait a moment. You may have a point there, too. The truth or falsity of it may have some bearing, you claim, on its being voluntary? Is that the point?

Mr. Solovei: Yes, and I say the names mentioned in there, that your Honor intends to call "X" and "Y", they are mentioned in there, are persons that did not commit the crime, are false, and we are told they were put in there for the

purpose of convenience of those who examined us at the time.

The Court: Listen, Mr. Solovei, I am trying to conduct this case in the manner provided by law and in line with all the decisions that protect the rights of defendants under like circumstances. I am doing my level best to give these defendants a scrupulously fair trial and not conduct it in a catch-as-can manner. If you have any authorities that you would like to 1622
submit to this Court, to help the Court, I will be glad to receive any and give that consideration.

Mr. Solovei: Well, I don't think—I thing myself it is a simple proposition and that is this: I ask that the confession, if admitted at all, must go in as is, without being altered, without having the names deleted, because we claim that these names that are mentioned in there are persons that did not commit the crime; therefore it corroborates the defendant Maliuski to 1623
such an extent that the names and the confession are therefore false. Supposing we have in there the name of John Jones, who is a banker, and was with us when we committed the crime—I am just giving you—

The Court: The sincerity or lack of sincerity of your point is not being passed on by the Court. Your objection is overruled and you have your exception.

Mr. Solovei: I except.

The Court: Sit down. Bring in the jury.

Mr. Solovei: There is no necessity of your Honor getting excited. I am just stating a point.

The Court: I understand the proposition of law and I am asking you to take your seat so we can continue the trial. You have your exception.

Mr. Solovei: Certainly.

The Court: The Court is not attempting to give you any advice how to proceed, Mr. Solovei. From now on you proceed without any further comment from the Court. The Court will rule at each step.

Mr. McGough: One point of information, your Honor. With respect to the deceased Beitler, does your Honor suggest or infer that perhaps that name should be left in or it should be deleted?

The Court: I will leave Beitler's name in there. Beitler is not a defendant.

Mr. Meadow: On that point, I would like to be heard.

The Court: Yes, I will hear you.

Mr. Meadow: So far as the theory of the indictment claims that Malinski acted in concert with the other two defendants, and one person by the name of Beitler—

The Court: That is right.

Mr. Meadow: Now the confession, of course, is solely competent as against Malinski.

The Court: That is right.

Mr. Meadow: Now by allowing the name

of Beitler in, it prejudices the defendants Rudish and Indovino.

The Court: In what way?

Mr. Meadow: In this respect; that it gives some proof or some testimony to show that Malinski and Beitler at least committed this crime. Now it should not be so competent because it should only be against the defendant Malinski alone.

The Court: Beitler is not a defendant here, Mr. Meadow. 1628

Mr. Meadow: I understand.

The Court: I think I am going further than any Judge of any Court ever went in protecting the rights of defendants.

Mr. Geoghan: I am satisfied.

Mr. Carabba: I am satisfied.

The Court: I do not know of any other Judge that ever does it this way.

Mr. Geoghan: It has been done.

The Court: I don't know of it.

Mr. Geoghan: But not so frequently.

The Court: I could very well let this 1629 whole business go in with just an instruction to the jury to disregard any reference to the other defendants.

Mr. Carabba: That is true.

The Court: And that is about all the defendants would be entitled to. I am going further than that.

Mr. Geoghan: I have not objected to it.

The Court: In the attempt to be scrupulously fair to these other two men, and there is an attempt being made to fox me into the corner.

Mr. Meadow: No.

The Court: Not by you gentlemen. I will not be foxed into any corner. Proceed.

Mr. Solovei: I do not think that is fair.

The Court: The jury is not here. The jury has not heard it.

Mr. Solovei: How am I doing that?

The Court: Now, please be seated. I do not want to hear you.

Mr. Solovei: Will your Honor permit me—

The Court: I said to this man, be seated. Put him in his seat. Sit down. Bring the jury back.

(The jury returns to the courtroom.)

The Court: I will hand you this statement and you gentlemen may confer among yourselves and look it over and take the necessary steps to carry out the order of the Court. While you are looking at it, Mr. Solovei shall have his opportunity to cross-examine this witness.

Mr. Solovei: I would like to look at the statement first.

The Court: You objected to it?

Mr. Solovei: I want to look at it. Don't your Honor want me to look at it?

The Court: You have already objected to it?

Mr. Solovei: I have a general objection but I have not seen the statement at all. I do not know what the contents of it is.

There may be a number of objections that I could make; I don't know.

The Court: You have stated that you desire to offer proof. You shall offer the proof at this time if you desire so to do, otherwise continue.

Mr. Solovei: I ask that I be permitted first to see the statement, your Honor, to see whether or not there are incompetent, irrelevant matters contained therein.

The Court: You have already objected 1634
to it.

Mr. Solovei: I have put in a formal objection.

The Court: There is only one kind of an objection.

Mr. Solovei: I now ask that I be permitted to see the statement for the purpose of making further objections.

The Court: Do you withdraw your objections at this time?

Mr. Solovei: What?

The Court: Do you withdraw your ob- 1635
jections at this time?

Mr. Solovei: No, I am going to object to the statement.

The Court: Do you withdraw your objection for the time being?

Mr. Solovei: For the time being, all right.

The Court: Show him the statement now.

Mr. McGough: I hand Mr. Solovei the statement.

Mr. Solovei: I will have to read the statement.

The Court: You may.

(Mr. Solovei and Mr. Geoghan each receive a copy of the statement which they examine.)

The Court: Proceed. Now you have read this document, haven't you, sir?

Mr. Solovei: Yes, sir.

The Court: Proceed.

Mr. McGough: I am offering it in evidence.

Mr. Solovei: I object to it.

The Court: Do you object?

Mr. Solovei: Yes, I intend to put—

The Court: I am not interested in your intention. You object to the introduction of the statement at this time?

Mr. Solovei: At this time.

The Court: And you ask leave of the Court to introduce evidence?

Mr. Solovei: That is right.

The Court: Proceed. Decision is reserved on your objection.

Mr. Solovei: Take the stand, Malinski.

The Court: This examination is limited to the question of the voluntariness of the confession as defined by law, and whether or not the statute has been violated.

Mr. Solovei: That is correct, sir.

The Court: And solely for that purpose.

Mr. Solovei. That is all.

The Court: Proceed.

MORRIS MALINSKY, residing at 714 Hinsdale Street, Brooklyn, N. Y., a defendant, called as a witness in his own behalf, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

The Court: Mark the statement for identification.

(Statement marked People's Exhibit D for identification.)

1640

Direct examination by Mr. Solovei:

Q. Malinsky, you are the defendant in this case, Morris Malinsky? A. Yes.

Q. And when were you arrested on this charge? A. 7:15, October 23rd, Friday morning.

Q. 7:15 a. m.? A. That is right.

Q. And when you were arrested where were you taken? A. To the Hotel Bossert.

Q. And while at the Hotel Bossert, did you see anybody there? I withdraw that. When you say the Hotel Bossert, do you mean to some of the rooms in the Hotel Bossert? A. I walked into 1641 the Hotel Bossert—an elevator, they took me up to the 6th floor and I walked into Room 608.

Q. And when you went there, when you got there, whom did you see in 608? A. Detective McNally.

Q. Who else? A. I walked in with Detective James Bell and Detective John McNally.

Q. Now who was it that arrested you on October 23, 1942, at about 7:15 a. m.? Who were the police officers, do you know? A. Detective John McNally and I think James Bell.

Q. And where were you coming from? A. I left my house at 714 Hinsdale Street. I got to the corner of Snediker and New Lots about a half a block from the station. I left my house at ten minutes after seven to get the twenty after seven train every morning and I get to work at eight o'clock. At quarter after seven I got to the corner of Snediker Avenue and New Lots Avenue and two men jumped out of the corner of the store and they put guns into my head and they said, "If you move, I will blow your brains out", 1643 and the next thing, one of them, Mr. Bell says to the other fellow, "Throw the cuffs on him." I said, "What is this?", and I moved back; so I said, "What is this, a kidnap"?

Q. Just take it easy. A. They said, "Never mind; don't move or I will blow your brains out". They put a pair of cuffs on my hand and they dragged me across the street to a big black car.

Q. And then they drove you to the Hotel Bossert? A. That is right.

1644 Q. Now while in the automobile from where you were apprehended to the time that you reached the Hotel Bossert, were you being questioned by them and did they ask you any questions, Yes or No? A. They did not ask me any questions.

Q. Now at the Hotel Bossert, were you asked questions when you arrived at the Hotel Bossert, and by whom? A. By James McNally: Lieutenant James McNally.

Q. And will you tell the Court and jury just what he asked you? A. As I walked in the door, he says to me, "Come here". He was sitting

in the back near the window in a chair and he had a chair near him. We sit down and he pulled a wallet out of his pocket and had a bunch of pictures there. He started showing me pictures, of one guy, another guy and another guy; showed me a lot of pictures. I said to him, "What is it all about?" So he said to me, "You killed Patrolman Leon Fox". I said, "I didn't kill anybody. I never had nothing to do with it. I never knew nothing about it and I don't know a thing about it". Then he says to me, 1646
"You don't know nothing about it". He got off his chair and he smashed me right on the face and I went over the chair and all. And then after I got up, I was there about 15 minutes, I got up off the floor, so he walks in the next room with James Bell, John McNally and him, and they are talking, and then he says, "Come here." I walk into the room; they got me in between the two beds, one is a living room and one is a bedroom, and I was in between the two beds and he said, "Undress". I said, "What for?" So he made me, you know I 1647
refused to undress. They started to rip my jacket off. They took my jacket off; my pants off; my shirt off; my tie off. The only thing they left me was in my underwear, my shoes and my socks. They said to me, "You don't know nothing"? I said "No", and the next thing I know, I got another smash in the face and down I went.

Q. How many police officers were there at the time, or detectives? A. When I walked in there was just two of them, John McNally and Detective Bell.

1648 *Morris Malinsky—For Defts.—Direct*

Q. Now did they all question you at times? A. That is right.

Q. You were there all morning? A. I was there from Friday morning October 23rd until Monday afternoon.

Q. Let us stick first to October 23, 1942. What time was it that Assistant District Attorney Heffernan got there? A. He got there about two o'clock in the afternoon; two or three o'clock. I cannot repeat exactly. It was around 2 or
1649 3 o'clock in the afternoon.

Q. And how were you dressed when he got there? A. In my underwear and shoes and socks.

Q. And did Assistant District Attorney Heffernan ask you any questions? A. He asked me questions and when I answered him, he said to me, "You are a God-damn liar".

Q. Was the question that he asked you in reference to the Fox shooting? A. That is right. I said to him the same thing what I told McNally and that I know nothing about it. I had nothing
1650 to do with it. I don't know nothing about it; I am innocent.

Q. How long did Assistant District Attorney Heffernan examine you in the room? A. Oh, I would say about half an hour or three-quarters of an hour.

Q. And then he left? A. Then he left.

Q. And did he come back again that evening? A. He come back about nine o'clock that evening.

Q. When he came back the second time, were you dressed at that time? A. Yes, sir.

Q. How many police officers were there at 9 o'clock in the evening while you were at the

Hotel Bossert? A. Oh, a gang of them. I don't know; it was an enormous amout of them in the room there.

Q. And did they again ask you questions? A. Every one of them. One would ask me questions and another would ask me questions and another one. I kept hollering to them I don't know nothing about it.

Q. And outside of being struck in the face as you testified to, were you hit in any other part of your body? A. Well, before Mr. Heffernan 1652
come into the room, I would say it was about 7 o'clock at night, they walked me over to the window where my clothes was laying and they said to me, "Do you see that roof that is six floors down? Do you see where you got your clothes on the windowsill? We will throw you out of that window and they will think you committed suicide". I said, "What do you want to do a thing like that for?" Then they pulled me away from the window and something struck me from behind and I fell over.

Q. Struck you where? A. Across the body. I 1653
said, "Don't hit me. After you hit me, you will kill me." I was afraid. I had 21 skin draft operations on my body.

Q. What do you mean? What did you actually do? A. I picked my shirt up and showed them my body.

Q. Will you please, with the Court's permission, take your shirt off and show this jury the condition of your body that you claim it was on October 23, 1942?

(The witness draws his shirt up and shows his body to the jury.)

Mr. Solovei: With your Honor's permission, may I have the record note that this man's body has evidently been skin-drafted and he says with 21 skin draftings.

The Court: All right.

Mr. Solovei: And it is across the entire chest.

The Court: Yes.

Mr. McGough: I did not see the entire chest.

1655 The Court: On his belly.

Mr. Solovei: All right.

The Court: Sit down.

By Mr. Solovei:

Q. And how late did you stay at the Hotel Bossert? A. I stood there until Monday.

Q. You mean you slept in the Hotel Bossert? A. I would stay up until three or four in the morning and they were questioning me and then I fell asleep and they come in and question me again and when I got up they question me again.

1656 Q. And that continued for how many days? A. Until Monday afternoon about 3 o'clock.

Q. You were arrested on Friday, October 23rd? A. That is right.

Q. That is at 7:15 a. m., is that correct? A. Yes, sir.

Q. You were there all day Friday; Saturday, the 24th of October; Sunday the 25th of October and Monday the 26th of October? A. That is right.

Q. Is that correct? A. Yes.

Q. And on the 27th of October, where were

you taken from the Hotel Bossert? A. We were taken from the Hotel Bossert the 26th of October to the 62nd Squad, the Bath Beach Station House.

Q. What time were you taken there? A. We got there; it was about 3:30 or a quarter of four in the afternoon.

Q. And according to the date that appears on this alleged confession, that is alleged to have been made on October 27, 1942, I don't know the hour, will you please give it to me— 1658

The Court: 2:10 a. m.

Q. At 2:10 a. m. A. That was in the station house.

Q. That was at the 62nd Precinct? A. That is right.

Q. From October 23, 1942, until October 27, 1942, you were not arraigned in any Magistrates' Court, were you? A. I was not.

Q. When were you booked in the police station? A. I would say about 5:30 or a quarter of six Tuesday morning. 1659

Q. That is on the 27th of October? A. That is right.

Q. This alleged confession, People's Exhibit D for identification, did you voluntarily make such a statement as appears in this alleged confession or statement? A. No, sir, I knew nothing about it until the police told me what to say and do. I says, "Stop beating me already, I cannot stand it no more. I will do and say anything you want me to say. Leave me alone. I ain't iron. I ain't had nothing to do with the crime. If you

want me to say what you want I will do and say what you want me to do and say."

Q. Did there come a time when they took you to the scene of where this crime was alleged to have been committed in Coney Island? A. That is right.

Q. Were you on the scene of this crime on February 15th—

The Court: The question is whether
1661 or not he was intimidated.

Mr. Solovei: I will withdraw it. It does not matter as far as I am concerned.

The Court: You have your right to question on that later unless of course you contend that that bears on the question of it being voluntary.

Mr. Solovei: That is the only reason I ask that.

The Court: I will let you show that. You may ask that question.

By Mr. Solovei:

1662

Q. This alleged statement that you made on October 27th, 1942, at the 62nd Precinct, about 2:10 a. m. on October 27th, which has been marked People's Exhibit D for identification, are the facts therein contained alleged to have been made by you, true or false? A. False. I didn't get what you mean. Did I say them things that are in there?

Q. I mean, are the facts contained in that statement true or false? A. To my knowledge, they are false.

Q. Now at the 62nd Precinct, Assistant Dis-

trict Attorney Heffernan again came there, is that right, with a stenographer? A. He was there and he went away and he come back and he went away. He kept coming and going all day long.

Mr. Solovei: I think that is all at this time.

The Court: Do you want to cross-examine at this time?

Mr. McGough: I have a few questions. 1664

The Court: Proceed.

Cross-examination by Mr. McGough:

Q. You say you were struck in the face and on the body? A. That is right.

Q. Give me the names of the men that you say struck you? A. Detective James Lowe.

Q. James Lowe? A. Yes, and Lieutenant James McNally.

Q. These are the men that you— A. He was the first man that struck me.

Q. Where did he strike you? A. He hit me 1665 right across the face.

Q. What part of the face? A. I was like facing him. He went like that there with his hand and I went over with the chair.

Q. What part of the face did the Lieutenant hit you on? A. Right over in the face.

The Court: Indicating the mouth and the nose.

Q. You mean right here? A. Yes.

Q. He gave you a backhand slap in what we call the "puss"? A. Yes.

By the Court:

Q. With sufficient force to knock you down? A. He hit me.

Q. He hit you hard? A. Yes.

By Mr. McGough:

Q. Did you tell us before that you went over on your back? A. I went over with the chair and all. I was like sitting on the chair like that.

Q. Did you fall back or fall sideways? A. Sideways.

Q. Now who else struck you, please? A. Then I walked in the room and Detective McNally—I don't know if it is his brother or not, but his name is McNally, too, I think John McNally and James Bell, and then they says to me, "Get undressed". I said, "For what"?

Q. I asked you who struck you next, Malinski. When? A. When I got in between the beds. I think two of them struck me.

Q. You think two of them struck you? A. I ain't sure how many, but I think two of them.

Q. And who are the ones that you think struck you? A. I think it was Bell and McNally.

Q. McNally gave you another one of these? A. That time they did not give me with the back. They hit me with the fist.

Q. He hit you with his clenched fist? A. One hit me in the stomach and one hit me up here in the neck and I fell down on the floor.

Q. Wait a minute. McNally gave you one with the clenched fist? A. That is right.

Q. Where did you say it was? A. McNally hit me in the stomach. He was in front of me and Bell was in back of me. I was between two beds.

Q. Where did Bell hit you? A. In the back of the neck.

Q. What with? A. With his fist.

Q. Now you say you think two of them struck you? A. That is right. 1670

Q. McNally was in front of you and you saw him give you one in the stomach with his fist? A. That is right.

Q. And then you say Bell gave you one in the neck and rear? A. Yes.

Q. Who struck you the next? A. Then I was there for a while.

Q. Who struck you next? A. Well, then they took me into the room again, into the living room. I was all undressed. I was in my underwear and shoes and socks only.

Q. You are sure about that? A. Yes. 1671

Q. Just had your shorts on? A. My shorts, undershirt, shoes and socks.

Q. You had your undershirt on? A. Yes.

Q. Tell me, was this in the Hotel Bossert? A. Yes, Room 608.

Q. On the 6th floor? A. Yes, sir.

Q. And of course when you got this terrific wallop, you let a piercing yell out? A. No, I did not holler.

Q. You did not yell in the Bossert Hotel? A. No.

Q. The cops were beating you up and you

didn't say anything? A. Not right away I didn't holler.

Q. At any time they hit you did you remain quiet and keep it to yourself? A. Most of the time, I did.

Q. You were afraid somebody would hear you? A. Because McNally said, "If you open your mouth I will throw you out of this window."

Q. And for that reason you kept your mouth shut? A. Yes.

1673 Q. Who hit you after Bell hit you? A. After a while I was in the room, they took me into the living room and there were chairs in the living room there.

Q. Who struck you next? A. Who struck me next?

Q. Yes. A. Detective James Lowe.

Q. You are sure it is not George Lowe? A. George Lowe. I know the man if I see his face.

Q. George Lowe struck you next? A. Yes.

Q. Where did he strike you? A. He walked over to me and I was sitting on the chair. He

1674 said, "You got a nice big pair of shoulders." He hit me right in the face but not too hard. He hit me in the face.

The Court: Indicating for the record a back swing of the right hand with the back of the hand, striking the face, is that correct?

The Witness: Yes.

By Mr. McGough:

Q. How did you fall when he did that to you?

A. I did not fall when he hit me. He didn't hit me hard; not hard enough to throw me over. I was sitting in one of the armchairs. He would really have to hit me hard to throw me over.

Q. How many times did he strike you? A. He just hit me once and got away from me.

Q. Is that the only time Lowe struck you? A. Then after about let us see what time—I would say about in the afternoon, about not in the afternoon, about what you say noontime, about 12 o'clock they all—all morning, and they were 1676 questioning me, asking different questions and I kept saying, "I don't know."

Q. My question is, is that the only time Lowe struck you? A. He hit me that time, that afternoon, too.

Q. Where did he hit you in the afternoon? A. I was standing up. Not only him hit me.

Q. Where did Lowe strike you? A. I got hit from a few of them. It come all at once.

Q. Do you know if Lowe hit you that afternoon? A. They all hit me. There was four of them hit me at one time. 1677

Q. You are pretty sure Lowe was one of them? A. Yes, sir.

Q. Did he strike you at any time after that before you went to the Raymond Street Jail? A. Yes, after I went to Raymond Street Jail—

Q. Did Lowe hit you any more? A. At night so they wanted me—McNally walks me over with Lowe and Bell and they say, "You see that roof down there." My clothes was on the window. He said to me, "You see where these clothes is. You are going to lay down on that roof over there. They will think you committed suicide."

So then I said, "What are you doing?" I backed away from the window and something hit me across the stomach and I keel over on the floor. I don't know who swung it but one of them hit me across the stomach with something.

Q. You could not see what it was? A. No.

Q. Did Lowe strike you again after that day? A. Then I started hollering—

The Court: Why don't you answer the District Attorney's question?

The Witness: After that day?

Q. Did Lowe strike you again after that day? A. No.

Q. So Lowe gave you one backhand right to the face and then that afternoon, you are not sure, but three or four of them were throwing punches then? A. They were throwing punches.

Q. In other words, Lowe treated you— A. He must have been in with them.

Q. He treated you pretty good? A. Who did?

Q. He only gave you a backhand to the face and only one— A. What do you mean one?

Q. Did Lowe treat you all right or did he give you a little bit of a shellacking every day? A. They did not hit me every day in the week.

The Court: I want to find out at this point something, Mr. McGough, if I may.

Mr. McGough: Yes.

By the Court:

Q. When the four of them got on top of you,

you said they were throwing punches? A. I was covered up.

Q. Did they hit you? A. Did they hit me?

Q. Did they land? A. Yes.

Q. They were landing on your head? A. On my head and body.

Q. How about your head? A. I had my hands up.

Q. Didn't they get by your guard? A. Not necessarily.

Q. You got at least two smashes in the face, 1682
didn't you? A. Yes, that was from Lieutenant McNally.

Q. On your nose, and the other one from Lowe? A. Yes.

Q. When you say your face, you mean around the mouth, around the nose? A. That is when McNally hit me.

Q. You are putting your hand up to it now? A. Yes.

Q. Were your lips cut? A. It was not exactly cut.

Q. No, no, just answer my question. A. On 1683
the inside.

Q. Did your mouth bleed? A. On the inside.

Q. Did your mouth bleed? A. On the inside; on the gums.

Q. And did your nose bleed? A. No, sir.

Q. Did your nose swell? A. It hurted me.

Q. Was it swollen? A. I didn't look in the mirror.

Q. Were your lips swollen? A. A little bit on the bottom.

The Court: All right; go ahead.

By Mr. McGoogh:

Q. Now from time to time the officers would leave the hotel and go out and come back, wouldn't they? A. Not the first day they didn't leave. They kept coming in until late at night.

Q. Wasn't there a time when somebody left? A. Yes, the first night this was, they left Saturday morning about two or three o'clock, the first night.

Q. Now when you saw Mr. Heffernan and you were about to be questioned with the stenographer present, did you tell him of the beatings the police gave you? A. No, I was warned if I say anything I would get worse when they left.

Q. Who warned you about that? A. McNally.

Q. The Lieutenant? A. Lieutenant McNally.

Q. He told you about that? A. That is right.

Q. At any time during these four or five days while you were at the hotel and the police were coming and going, did you ever ask for a doctor? A. I asked Lieutenant McNally for a doctor.

Q. What did he say? A. He said to me, "What do you want to do, tell him something?" I said, "No, get me a doctor." I was sick. I didn't do nothing and I couldn't drink anything and they were telling me what I was being charged with and I was sick to my stomach.

Q. You knew you were being held there for the murder of the cop, is that right? A. I told them I did not commit it.

Q. They asked you, McNally did in the hotel, he said, "You know you killed Fox"? A. He said to me, "You killed Patrolman Leon Fox."

Q. And then you started to get sick, is that right? A. What?

Q. Did you say then you started a feel sick? A. I said it was a frame-up because I was being charged with a crime I never committed.

Q. At any rate, you asked McNally for a doctor and no doctor came? A. I did not ask the first day for a doctor.

Q. You did not feel you needed a doctor's attention the first day? A. That is right.

Q. In other words, the first day nothing happened to you? A. Yes.

Q. The second day, you really thought you 1688
ought to have a doctor? A. Yes, sir.

Q. Was it because you felt sick on the second day or was it because of the beating they gave you? A. I felt sick; my face was like swollen. I told them my mouth hurts me, too.

Q. When you landed down at the prison, did you ask to see the Prison Doctor? A. I didn't see no doctor.

Q. You didn't make any complaint to the doctor at the Jail? A. No, sir.

By the Court: 1689

Q. The District Attorney asked you if you asked any of the officials to get you a doctor when you got to the Raymond Street Jail? A. I didn't have no injuries.

Q. The District Attorney asked you a question. Will you please answer it. He asked you whether when you arrived at the Raymond Street Jail, when the cops did not have you, whether you asked any of the officials there for a doctor? A. No, sir.

By Mr. McGough:

Q. And while you were down at the Jail, you never needed the services of a doctor at any time, isn't that the fact? A. When I was where? Raymond Street?

Q. Either at Raymond Street or the Queens County Jail? A. When I come into Raymond Street, the doctor came and I don't know what they call it, and gave me a Wassermann; they do
1691 that as a routine, and as he was giving it to me, I passed out.

Q. But I say you never complained at any time while you were at Raymond Street that you wanted a doctor to look you over? A. For the first three weeks I was arrested, I did not even know I was alive.

Q. Answer my question, please; did you ever ask for a doctor while you were down there? A. No.

Q. Do you remember the time that McNally said, "Take your clothes off, I want to take a look
1692 at your body?" A. He did not say he wants to look at my body at all.

Q. Did he say, "Get your clothes off?" A. He said, "Come in here." When I come in there, they ripped my jacket off.

Q. They got your clothes off? A. Yes.

Q. Didn't they look all over your body? A. Yes, sir.

Q. Didn't they ask you if you had any bullet wounds in your body? A. They did not ask me.

The Court: The question is improper in form. Ask him if such a thing happened.

By Mr. McGough:

Q. Withdrawn: At the time that your clothes were taken away, did McNally say to you, "Try to escape from the hotel in your BVD's? A. He did not say that.

Q. He did not say that? A. No.

Q. Didn't he say that he is not going to take a chance on you getting away? A. No.

Q. And that is why they did take your clothes? A. No, that is not right. 1694

Q. You could not have found your clothes and put them on and got out, could you? A. I would not take a chance to go with my clothes. They are on the windowsill near a window, on account of what they say they were going to do with me.

Q. And all your clothes were on the window while you were there? A. At 8 o'clock, he gave me my clothes back.

Q. How many days did you go without your clothes? A. Just that one day.

Q. That was the first day? A. Until 8 o'clock. 1695

Q. And you did not confess until the 27th, is that right? A. Until when?

Q. The 27th, out at the 62nd. A. No, that night.

Q. The 27th? A. No, that night, I said, "Stop hitting me." I said, "I cannot stand it no more. I will do and say everything you want me to do and say." This is about twelve hours after they saw me and he said—I says to him, "What do you want me to say?" So he took me into another room and Spielfogel was there in the hotel with him, the two of them, and started telling me different things. First he sent

1696 me into a closet with Spielfogel and I said, "Could I talk with Spielfogel?" I said to him, "What are you doing with me?" He said, "Honest, Moish, I know you didn't commit the crime. Dave Yellin committed the crime but tell them anything to get out of it. My wife says you were intimate with her." I said, "I never touched her. Didn't she tell you that when she was in the street and you and Dave Yellin put the guns to my head and your wife admitted it
1697 that it wasn't so and had she said it was, you would have shot me in the head," and he turned around and gave the wife a black eye.

Mr. Solovei: I suppose you do not want that part?

Mr. McGough: It is all right.

The Court: Proceed.

By Mr. McGough:

Q. Was it then that you said to Spielfogel, "Well, they knew so much. I guess I better
1698 go out and tell them the rest". A. I never said that to him. He knows that himself. He is the guy that says to me, "Hey, Moish, don't let them hit you. You know you didn't do it. Go out and say I told you to tell the truth."

Q. Do you know any other names of police officers that you say struck you? A. No, sir.

Q. McNally and Bell and Lowe, is that right? A. The two McNallys.

Q. The two McNallys? A. Yes.

Q. What did the second McNally do? You did not tell me that. A. The four of them got

me together in the hotel and they were swinging away at me.

By the Court:

Q. Where did they strike you? A. All over.

Q. Four men were beating you? A. One of them hit me in the back.

Q. I want to understand what you claim so that I may be in a position to rule on it. Where do you claim they struck you? A. I was standing—first one walked over and hit me, McNally. 1700

Q. What did he hit you with? A. With his hands.

Q. With his first? A. And he punched me in the stomach, and another one in back of me and I straightened up.

Q. Let us get one at time so we can make that clear. A. I don't know how many they were.

Q. One struck you in the stomach with his fist? A. Yes. That was the start of it and I covered up.

Q. And you got one in the back of the ear? A. Yes. 1701

Q. With the fist? A. Yes.

Q. You mean where the bone is? A. Somewheres over here.

Q. With the fist? A. Yes.

Q. And was that a heavy blow? A. Yes, they were punching away.

Q. That is two blows. Can you tell us if you got a third blow? A. I was getting them all at one time.

Q. How many blows? A. I could not count it; could not count it.

Q. Was it more than two? A. Sure.

Q. More than five? A. I imagine it was more.

Q. And each of the blows was a heavy blow, wasn't it? A. Yes.

Q. Where did these blows land? A. When I got through, it was hurting my back.

Q. Where did they land? A. One on my back; one on my head and one in my face.

Q. What part of your face was struck? A. In my face, on the top of my forehead.

Q. What part of the top of the forehead? A. Right here (indicating).

Q. Indicating the right forehead? A. Yes.

Q. Where else were you struck, what part of the body? A. In the stomach.

Q. How many times were you struck in the stomach? A. I could not count them.

Q. Where else were you struck? A. In the stomach, my back, in the back of my head and on my forehead.

Q. And all in all how many blows were rained upon you by the four men? A. I could not count them.

The Court: All right; go ahead, Mr. McGough.

Mr. McGough: That is all.

Mr. Solovei: That is all.

The Court: Step down.

(The witness leaves the stand.)

The Court: Come back here for a minute.

1705

MORRIS MALINSKY, recalled.

By the Court:

Q. Did you appear before a Magistrate? A. The fourth day after they had me.

Q. That would be what day? A. October 27th, Tuesday morning.

Q. In the Homicide Court? A. Felony Court.

Q. Did you stand up in the presence of the Magistrate? A. Yes.

1706

Q. Right in front of the bar? A. Yes, sir.

Q. Within his view? A. Yes, sir.

The Court: All right, step down. Proceed, Mr. Solovei.

Mr. Solovei: That is all, your Honor.

The Court: On the voir dire?

Mr. Solovei: On the voir dire, yes, except that I just want to ask the District Attorney to make a concession as to the day that he was arraigned, in view of your Honor's questions, I think it was the 29th of October.

1707

The Court: He said the 27th.

Mr. Solovei: That is the date the statement was taken.

The Court: The defendant said the 27th.

Mr. Solovei: Subject to correction, your Honor, the District Attorney will find it out.

Mr. McGough: The statement is 2:10 here around that morning.

Mr. Solovei: That is the voir dire as far as the defense is concerned.

The Court: Do you desire to introduce some evidence on the subject, Mr. District Attorney?

Mr. McGough: Yes, your Honor.

The Court: It is now half past five and I think we will take that up tomorrow morning.

Mr. Foreman and Gentlemen of the jury, the Court is about to take a recess until tomorrow morning at ten o'clock. I must admonish you again not to discuss this case either among yourselves or with any other person or permit any person to speak to you about this case. To make doubly sure, not that I anticipate any eventuality of that sort, all conversations had with jurors will hereafter be in the presence of the Court Officer, and no private conversations are to be had under any circumstances without permission of the Court. We are now reaching the close of the trial and let us obey the admonition of the Court. Do not read anything in the public press, if any article should be in the public press. The Court Officers are instructed that the jurors may have newspapers but they will be examined by the Court Officers before the jurors have access to them, and if there is any article in the paper about the case it will be deleted before the jurors see the newspapers. I admonish you again, Gentlemen of the jury not to form or express any opinion or conclusion as to the guilt or innocence of the defendants or either

of them or any of them until the case is finally submitted to you by the Court after a charge on the law. You may retire and return tomorrow morning at ten o'clock.

(The jury retires from the courtroom.)

The Court: The defendants are remanded.

Recess to 10 a. m. to June 18, 1943. 1712

Brooklyn, N. Y., June 18, 1943.

After Recess. Trial Resumed.

Mr. McGough: I take it that I will be permitted at this time to offer some evidence on the voir dire. I would like to call some witnesses at this point.

The Court: Yes. 1713

LIEUTENANT JAMES McNALLY, shield No. 262, 62nd Squad, called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Lieutenant McNally, are you in command of the 62nd Squad in the Borough of Brooklyn? A. I am.

Q. Did you handle the investigation into the death of Leon Fox in Coney Island back in

1714 February, 1941? A. I did. I was specially assigned to that case.

Q. By that, you mean assigned by the Police Department to this investigation? A. Yes, sir.

Q. Now, Lieutenant McNally, with respect to the defendant Morris Malinski, did you see him at the Bossert Hotel some time about the date of his arrest, in October, 1942? A. I did.

Q. Did you see him at other places besides the Bossert Hotel? A. Since that; yes.

1715 Q. Did you see him at the 62nd Squad? A. Yes; I did.

Q. When you saw him at the Bossert Hotel did you have a talk with the defendant about this case? A. I did.

Q. Did you at any time strike him? A. I did not.

Q. Did any police officer or any other person in your presence strike this defendant Malinski? A. They did not.

Q. Did Malinski at any time complain that some police officer or police officers struck him? A. He did not.

1716 Q. Did you, Lieutenant McNally, with your hand, indicating in a backward fashion, slap this defendant Malinski on the face? A. I did not.

Q. Did you, Lieutenant McNally, with your clenched fist, strike this defendant Malinski in the stomach? A. No, sir.

Q. Did anybody else do that at any time while you were there? A. No, sir.

By the Court:

Q. Did anybody threaten to throw him out of the window? A. No, sir.

Q. At any time? A. Any time.
Q. In your presence? A. No, sir.

Cross-examination by Mr. Solovei:

Q. Lieutenant, how long have you been a member of the police force? A. Sixteen years.
Q. How old a man are you? A. Forty.
Q. How tall are you? A. Five eleven.
Q. And how heavy are you? A. 175.
Q. Now, when was the defendant Malinski 1718
arrested? A. He was taken into custody on the 23rd of October about 7:30 a.m.
Q. He was arrested in the Borough of Brooklyn? A. He was.
Q. That was as he was leaving his home in the Borough of Brooklyn, is that correct? A. I was not present when he was arrested.
Q. You were so informed? A. Yes.
Q. And was it Detective Bell and Detective Lowe who took him in custody? A. No; Detective Bell and Detective McNally.
Q. That is not yourself; that is another Mc-
Nally? A. That is my brother. 1719
Q. When he was taken in custody he was brought immediately to the Hotel Bossert in the Borough of Brooklyn, is that correct? A. He was.
Q. And the Hotel Bossert is not a police station nor is it any branch of the Police Department of the City of New York; is that correct? A. That is correct.
Q. Nor it it any branch of the District Attorney's office of the City of New York? A. No, sir.

Q. You had two rooms at the Hotel Bossert, is that correct? A. We did.

Q. You brought him up there to those two rooms, is that right? A. Yes, sir.

Q. And immediately upon his arrival at the Hotel Bossert were you there? A. I was.

Q. Did you immediately commence interrogating the defendant Malinski? A. I stripped him first.

Q. Did you then interrogate him? A. I did.

Q. Did you ask him questions? A. Yes, sir.

Q. You asked him all about the Fox murder, is that correct? A. I questioned him on the Fox murder, yes, sir.

Q. Was he seated in a chair at the time? A. When he first came in?

Q. What? A. When I first questioned him?

Q. Yes. A. When I first questioned him about the Fox case?

Q. Yes. A. No, sir.

Q. Was he standing up? A. Yes.

Q. How many police officers were at the Hotel Bossert when Malinski arrived, outside of yourself, your brother McNally and Detective Bell? A. No one.

Q. Just the three of you? A. That is all.

Q. For how long a period of time would you say you questioned Malinski before some other detectives came in? A. Till 5:30 that evening.

Q. 5:30? A. Yes, sir.

Q. In other words, you say about 7:30 in the morning— A. He was brought there about 8:15, arrested about 7:30.

Q. About 8:15 that morning—there were no other police officers came into the Hotel Bossert

till about 5:30 that evening; is that correct? A. No; that is not correct.

Q. That is what you said? A. Yes, I know. I take that back.

Q. All right; just correct it. A. Detectives Lowe and Celano came to the hotel about eleven o'clock, I believe.

Q. In the morning? A. In the morning; and I sent them right out again.

Q. How long did they remain in the premises before you sent them out? A. I would say about 1724 half an hour.

Q. What time did they come back? A. They came back at six o'clock.

Q. About six o'clock? A. Yes, sir.

Q. Did Detective Bell and and your brother officer, Detective McNally, also examine the defendant Malinsky by asking him questions? A. Yes, sir.

Q. In other words, at different times the three of you asked him questions from time to time, is that correct? A. That is right.

Q. You asked him whether he knew anything 1725 at all about the Fox murder or whether or not he participated in the Fox murder; is that correct? A. I did.

Q. You tried to break the Fox murder case? A. Every cop did.

Q. I mean you were trying at that time to break the Fox murder case? A. That is right.

Q. Did you carry the case? A. No, sir; I was assigned to Queens when it happened.

Q. Who was the officer that carried the case? A. Well, the original officer assigned to it, I don't recall, but later on Detective Lowe was

assigned to it. Basch, I believe, was the original detective.

Q. When you were asking the defendant Malinsky about the Fox murder case, did he continuously, in substance, deny knowing any knowledge at all about the Fox murder case? A. He did until 5:30.

Q. Until what time? A. About 5:30 p.m.

Q. 5:30 p.m. that evening? A. Yes, sir.

Q. Did Assistant District Attorney Heffernan
1727 come in between 8 o'clock in the morning and 5:30 that evening? A. I believe he came in in the afternoon a little while and went out again.

Q. You know as a matter of fact, don't you, Officer, that he actually did come in around two or three o'clock that afternoon? A. I believe he did. I don't know just what time it was.

Q. When he came in he also spoke to the defendant Malinski, isn't that corect? A. No; he did not, sir.

Q. You mean he came there and did not say a word to Malinsky? A. He did not say a word.

1728 Q. You know he was in charge of the District Attorney's office in matters of this kind, to go to see if he could not get a statement from a prisoner who was apprehended charged with the alleged commission of a crime? A. I do.

Q. You know he came there for that purpose isn't that correct? A. He did not.

Q. Did he come in just to say hello to you? A. He came in to take a look at Malinsky, but had nothing to say to Malinsky.

Q. You mean just to look and then walked out? A. That is all.

Q. Did you send for him? A. I believe I

called Mr. Heffernan and told him we had Malinsky.

Q. It is customary in cases of this character, when you apprehend a person or a suspect, to call up the District Attorney's office to get him over there to see if he cannot get statement; isn't that right? A. Not in this case it was not.

Q. You mean this case took an unusual course, is that what you mean? A. No; I had been working with Mr. Heffernan on this case.

Q. In any event, you say Mr. Heffernan who 1730
came there about two o'clock or three o'clock—what time would you say it was? A. It was in the afternoon.

Q. Am I correct when I say about two or three o'clock? A. You could be; yes.

Q. He walked in and spoke to you and your brother officers and never said a word at all to Malinsky? A. That is correct.

Q. Not a question did he ask him? A. Not a question.

Q. How long did he remain there? A. A very short period. 1731

Q. Now, there was Slip was there, wasn't he? A. He was.

Q. What time did Slip get there? A. About 10:30 or 11 o'clock.

Q. 10:30 in the morning, is that correct? A. Yes, sir.

Q. You had spoken to Slip before, didn't you? A. I had.

Q. Did you speak to him in Sing Sing? A. Yes, sir; on several occasions.

Q. When was the first time you spoke to Slip

in Sing Sing? A. I believe it was some time late August; the exact day I could not tell you.

Q. August of 1942?

The Court: This is on the voir dire as to whether they beat your client.

Mr. Solovei: That is right.

The Court: You appreciate that.

Mr. Solovei: Yes; I appreciate that.

The Court: What has his conversation with Slip in Sing Sing got to do with whether or not he beat your client. If it has any bearing on that I will let you pursue it, but please let us not lose sight of the object of this examination.

Mr. McGough: If counsel wants to cross-examine him, I will tell him now I intend to call him back.

Mr. Solovei: I am not going to go into this matter.

The Court: You are talking about what happened in Sing Sing with Slip, instead of finding out what happened in the Hotel Bossert?

Mr. Solovei: I am going on to another ground right now. I just asked the question.

By Mr. Solovei:

Q. You kept the defendant Malinsky at the Hotel Bossert? A. I did.

Q. From October 23rd, 1942 to October 27th, 1942; is that correct? A. 26th, I believe—

Q. He was not taken over to the Bath Beach

Station House until the 27th, was he, Officer? A. Taken there Monday.

Q. Have you got a memorandum of any kind that can refresh your memory? A. No; I have not. The 24th was Saturday. The 26th he was taken to Bath Beach.

Q. What time was he taken over to the Bath Beach Station? On the 26th, on Monday, would you say? A. About 5 p.m. He was booked about 4 a. m. on the 27th.

Q. And when do you say he was booked? A. 1736
On the 27th.

Q. What time was it he was booked on the 27th of October, 1942? A. I was not present then, but I believe it was around 4 o'clock in the morning, 4 a. m.

Q. 4 a. m. on the 27th? A. I believe so.

Q. Or was he booked in the afternoon? A. Booked in the morning, I believe.

Q. And then it was at the Bath Beach Precinct that morning at about 2:10 a. m. on October 27th, 1942, that Mr. Heffernan was present when the defendant Malinsky made a statement; is that 1737
correct? A. Yes, sir,—to Mr. Heffernan.

Q. That you were present? A. Yes.

Q. Detective McGowan was present? A. Captain McGowan.

Q. Captain McGowan, is that right? A. That is right.

Q. Detective Celano? A. That is correct.

Q. Detective Dowdell? A. Acting Captain Dowdell.

Q. And Lieutenant James McNally—that is yourself? A. Yes, sir.

Q. Detective John McNally, is that right? A. That is right.

Q. Detective George Lowe, is that correct? A. That is right.

Q. Lieutenant George Loures, is that correct? A. Yes.

Q. And Detective James Bell, is that correct? A. That is correct.

Q. And this was about 2:10 a. m. in the detectives squad room when this statement was taken,
1739 in the presence of all of these men whose names I have mentioned; is that correct? A. Yes.

Q. Now, how long have you been on the New York Police Force? A. 16 years.

Q. How long have you been a detective? A. 15.

Q. You are familiar with that section of the Code of Criminal Procedure which says that a defendant must in all cases be arraigned before a Magistrate without unnecessary delay? A. I am —when he is arrested.

Q. When he is arrested? A. Yes.

Q. Well, Malinsky was in custody on October
1740 23, 1942, wasn't he? A. Yes. He was not arrested until the 27th.

Q. You mean you kept him there for four days without the man being arrested? A. On his own accord.

Q. You mean he was kept there on his own accord, is that what you mean? A. Yes.

Q. To tell this Court and jury? A. Yes.

Q. You mean he liked the Hotel Bossert and said, "I like to say here"? A. He liked the Hotel Bossert in preference to a station house cell.

Q. You kept him there? A. I asked him if he wanted to be booked on Friday, or would he

rather stay at the Hotel Bossert with his friend Slip; so he chose Slip and the Bossert.

Q. Slip did not sleep at the Bossert, did he? A. No; but he came back every morning.

Q. The defendant Malinsky remained at the Hotel Bossert for four solid days before he was booked on this charge; isn't that correct? A. That is right.

Q. It was at his suggestion you kept him at the Hotel Bossert, is that right? A. After; yes.

Q. On Saturday, October 24th, how many de- 1742
tectives were at the Hotel Bossert? A. On Saturday, October 24th?

Q. Yes. A. Oh, there was quite a few; maybe ten.

Q. Ten detectives, and on Saturday, October 24th, you and many of the other detectives were continuously examining and talking to Malinsky; isn't that correct? A. That is right.

Q. Well, you were talking to him and others, isn't that correct? A. We were all finished with Malinsky.

Q. You mean you did not say a word to him 1743
at all, the 24th? A. We were talking to him about anything—not necessarily this.

Q. You did not talk to him about this case on October 24th, is that right? A. I probably did. I was not asking him if he committed the crime then.

Q. On October 25th, Sunday, October 25th, Malinsky was still at the Hotel Bossert, is that correct? A. That is correct.

Q. On October 24th, how many police officers were there? A. I said ten or twelve.

Q. On Sunday, I am talking about? A. Same thing.

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Q. Still ten or twelve on Sunday, October 25th, 1942, while Malinsky was at the Hotel Bossert, did you and the other detectives examine or talk to Malinsky about this case? A. I suppose we did to clear up certain points.

Q. In fact, that went on for hours and hours and hours, is that correct? A. No, sir.

Q. On Monday, October 25th, 1942, Malinsky was still at the Hotel Bossert, is that correct? A. 11 o'clock in the morning.

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Q. He was there until 11 o'clock? A. Yes, sir; on Monday he was there until 11 o'clock in the morning.

Q. 11 o'clock in the morning? A. Yes; I believe it was 11 o'clock; between 11 and one.

Q. I think Monday was the 26th? A. Monday is the 26th.

Q. On the 26th he was there until 11 o'clock in the morning? A. About 11 o'clock.

Q. And there were at least about ten detectives there that morning? A. Ten or twelve.

Q. They were still, each and all, asking him

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questions? A. No, sir.

Q. Did not say a word to him? A. They talked to him; yes, sir.

Q. About the Fox case? A. I don't know whether they talked to him about the Fox case.

Q. You think they talked to him about his health? A. Sure, they did.

Q. They wanted to find out how he was feeling; is that right? A. He had a very nervous stomach.

Q. They wanted to find out how he was feeling; is that right? A. No; they did not care how he felt.

Q. He had a very nervous stomach is that it? A. Yes; he did.

Q. He was not feeling very well, is that right? A. He was not feeling very well from the morning he was brought in and told he was going to be questioned on the Fox case.

Q. He was not feeling very well and he had a very nervous stomach when you examined him on the 25th? A. He had a very nervous stomach from Friday. From Friday on he had a very nervous stomach. 1748

Q. Did he tell you he was not feeling well; yes or no? A. I told you he said he had a nervous stomach.

Q. I ask you did he say he was not feeling well? A. Well, if he told me he had a nervous stomach that implies that.

Q. Did he ask for a doctor? A. He asked for a doctor on Friday, fifteen minutes after he was brought in; said he was sick, had a nervous stomach.

Q. Did you get him a doctor? A. I did not.

Q. Did he ask for a doctor on Saturday? A. 1749
No, sir.

Q. Did he ask for one on Sunday? A. No, sir.

Q. Did he ask for one on Monday? A. No, sir.

Q. Did you give him an opportunity to communicate with his friends or a lawyer? A. I did not.

Q. Now—

By the Court:

Q. While Mr. Solovei is reading some paper, I want to ask you what the occasion was for taking his clothes off, stripping him?

Mr. Solovei: I object to the question.

The Court: You object to it?

Mr. Solovei: Yes.

The Court: Sustained. Well, now, I am going to overrule your objection.

Mr. Solovei: I except.

The Court: You may except.

By the Court:

Q. Tell us why you stripped him? A. In the first place, your Honor, we did not know whether any of the men in connection with the Fox case had been shot, so I had him stripped, I had him strip himself for that purpose.

Q. For what purpose? A. To see if he had any bullet wounds on him, bullet scars, wounds. Secondly, at some time during the day there was only one detective and myself present. We had Sielfogel down from Sing Sing, and we had this man—if he was going to try to escape he would have to do it in the nude.

Mr. Solovei: Now in view of this answer to your Honor's question I ask for the withdrawal of a juror and declaration of a mistrial, on the ground prejudicial, incompetent and irrelevant testimony crept into this case.

The Court: Your motion is denied, because you asked the policeman, I believe, whether he stripped the defendant; and I don't want the jury to be mystified as to the reason why he was stripped. This officer's testimony is to be weighed and

scrutinized by the jury. They are not bound to accept his explanation at all. His credibility is a matter solely for the consideration of the jury. The jury will understand that.

By Mr. Solovei:

Q. Lieutenant, do you remember the defendant Malinsky, at one time while at the Hotel Bossert, picking up a chair and telling you or 1754
the other officers there, if you heard that he received twenty-one skin graftings on his stomach; and please not to hit him again? A. No, sir; I don't remember that.

Q. If anything like that transpired, you mean it was not done in your presence; is that correct? A. I saw the marks on his chest.

Q. I say if anything like that transpired that I related to you, other than seeing the marks on his chest or on his stomach, you were not present? A. No, sir.

Q. Now, Officer, have you ever read Section 1755
1841 of the Penal Law? A. What is that?

Q. In reference to a public officer or a person holding a public trust—

Mr. Solovei: With your Honor's permission may I read it?

Mr. McGough: I object to it.

Mr. Solovei: To see if he is familiar with it, instead of giving it in piecemeal.

Mr. McGough: Not proper cross-examination; it is incompetent, irrelevant

1756 and immaterial, going into legal matters; which I submit at this time is not proper.

The Court: Objection overruled.

By Mr. Solovei:

Q. I will read you Section 1841 of the Penal Law and tell me whether you are familiar with it, have heard of it before. "A public officer, or person holding a public trust or employment, 1757 upon whom any duty is enjoined by law who wilfully neglects to perform the duty is guilty of a misdemeanor. This section and Section 1840 do not apply to cases of official acts or omissions the prevention or punishment of which is otherwise specially provided by statute." Did you ever hear of that section before? A. Yes, sir, I read it.

Q. Did you ever read or was it ever read to you, Section 1844 of the Penal Law? A. What does that apply to?

Q. (Reading.) "A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor." A. Yes; I read it.

Q. Familiar with that section? A. I do.

Q. In spite of the fact that you are familiar with Sections 1841 and 1844, and Section 165 of the Code of Criminal Procedure, and had been prior to the time that this defendant was apprehended; Malinski was not taken before a magistrate, arraigned or booked on this charge,

until October 27, 1942; is that correct? A. That is correct.

Q. Now, I think you said something about while Malinski was at the Hotel Bossert, I understood you to say—if I am wrong correct me—that he was not placed under arrest at that time yet; is that correct? A. That is right.

Q. And in spite of the fact that the man was not placed under arrest immediately upon his arrival at the Hotel Bossert, you made him take his clothes off; is that right? A. I did not take 1760 his clothes off.

Q. You ordered him to take his clothes off? A. He took his own clothes off.

Q. You mean he voluntarily took his clothes off? A. No; I told him to take his clothes off and he took them off.

Q. It was not done on his own initiative? You told him to take his clothes off and he took them off, is that right? A. That is right.

Q. That was, you say done around eight o'clock in the morning? A. About that.

Q. From eight in the morning did he still re- 1761 main with his clothes off? A. About six o'clock, I believe.

Q. Six o'clock that evening? A. He put his shorts on earlier than that, and later we put a blanket around him.

Q. At one time there he was stripped, entirely stripped, is that correct? A. Yes, sir.

Q. He had nothing on; is that right? A. That is right.

Q. From eight o'clock in the morning to what time was it that he had no clothes on at all? A. I should say about probably eleven o'clock.

Q. In the morning? A. Yes.

Q. From eleven o'clock in the morning until about six o'clock that evening you say he had just had his B.V.D. shorts on, is that correct? A. Yes; and a blanket.

Q. And a blanket? A. Yes, sir.

Q. You gave him the blanket? A. We did. Somebody gave it to him.

Q. Now, when you saw him from eight to eleven o'clock in the morning, and you stripped
763 him, you say you were looking to see whether or not he had any bullet wounds. You noticed that there were no bullet wounds on his body; is that correct? A. That is correct.

Q. And in spite of that fact that he had no bullet wounds on his body he still—the only clothes you let him put on was his B.V.D.'s, is that correct? A. That is correct.

Q. Officer, if Malinsky, after you examined him, say about eleven or twelve o'clock, and you found no bullet wounds on his person or on his body, had wanted to leave the Bossert to go
764 home, would you let him go? A. I would not.

Mr. McGough: I object to that.
The Court: Overruled.

Q. If he wanted to leave at six o'clock or five o'clock, would you let him go home? A. No.

By the Court:

Q. He was in custody at the time, wasn't he? A. Yes.

Redirect examination by Mr. McGough:

Q. Do I understand you to say about 5:30 on the day he was picked up, he told you everything about this case? A. Yes.

Q. Then he was held for about three, three and a half or four days after that; is that right? A. Yes.

Q. Finally, on the 27th Mr. Heffernan came down and took what is called a question and answer statement with the help of Mr. Maguire 1766
the stenographer? A. First we went to Coney Island, then back to Bath Beach.

Q. That is what I am getting at. On the 27th day Mr. Heffernan then took the statement from him? A. Yes.

Q. In between Friday at 5:30, when he told you everything, about four of five days later were you continuing the investigation?

Mr. Solovei: Object to the form of the question.

Mr. McGough: If there is any objection, I will withdraw it. 1767

By Mr. McGough:

Q. On the day he finally told you at 5:30, had you apprehended Indovino and Rudish? A. No, sir.

Q. Were you or your men during that interval of three days working on the apprehension of those men? A. Yes.

Mr. Geoghan: Objected to.

1768

Mr. Carabba: Objected to.
The Court: Overruled.
(Exceptions.)

By Mr. McGough:

Q. In other words, were you continuing your investigation; yes or no? A. Yes, sir.

Q. Did this defendant go to Coney Island in your presence? A. Yes, sir.

1769 Q. Where did you start from on the day you went to Coney Island? A. From the Hotel Bossert.

Q. Who was with Malinsky and you? A. Spielfogel, Detective McNally, Detective Bell, Detective Celano, Mr. Heffernan of the D. A.'s office, and the chauffeur was John Urban, the D. A.'s chauffeur.

Q. In other words, the chauffeur for the Homicide Squad car? A. It was a Homicide Squad car.

Q. Who directed the chauffeur what streets, what route to take? A. After we reached Ocean
1770 Parkway, Malinsky directed the chauffeur from that point on.

Mr. Solovei: I object to this line of questioning.

The Court: I will reserve decision on the objection at this time; because, I take it, that may be in the nature of a confession. I take it that is what it is offered for, a confession—not necessarily verbal, but by conduct and otherwise. I am reserving decision on any statements and

conduct that may be construed as a confession until I have ruled on the admissibility of it. Then, if I permit you to mark the statement in evidence, either oral or written or both, and allied conduct, then I well permit you to go into it. I am going to rule on the question of the voluntariness of the alleged confession. Do you follow me, Mr. McGough?

Mr. McGough: Yes; and I think your Honor is right, and I am going to withdraw this witness and put him back on. However, I want to make my position clear. It is my contention that I have a right to show why the man was held three or four days. 1772

The Court: I will permit you to do that. But that is not what I am thinking of at this time.

Mr. McGough: That is all, Lieutenant.

The Court: Have I made the point clear, Mr. McGough?

Mr. McGough: Very clear. 1773

The Court: I want to limit this inquiry—

Mr. McGough: Strictly to the voluntariness of the confession.

The Court: That is right.

Mr. McGough: All right.

1774 *Det. James A. Bell, Jr.—For People—Direct*

DETECTIVE JAMES A. BELL, Jr., shield No. 1136, 64th Squad, called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Detective Bell, on the 23rd of October, 1942, did you and a brother officer pick up this defendant Malinsky? A. I did.

1775 Q. What was the name of the brother officer, please? A. John McNally.

Q. About what hour on that day did you pick him up, and at what location? A. About seven a. m., at New Lots and Snediker Avenue.

Q. After you picked him up where did you take him to? A. Bossert Hotel.

Q. Were you working on this investigation under the direction and supervision of Lieutenant McNally? A. I was.

Q. How many other men besides yourself were working with him at that time? A. Four.

1776 Q. Besides yourself there were four? A. Four.

Q. Tell the Court and jury the names of the other officers? A. Lieutenant McNally, John McNally, George Low, Charlie Celano, and myself.

Q. Now, Detective Bell, did you ever strike this defendant Malinsky at any time while he was at the Bossert or any place else? A. I did not.

Q. Did you observe any other officers or persons strike this defendant at any time? A. No.

Q. Did this defendant Malinsky ever make a complaint to you about being beaten? A. He did not.

Q. Did you and Lieutenant McNally and De-

tective John McNally and Detective George Low, all at one time, or alone, ever strike this defendant Malinsky? A. No.

Q. Did Malinsky ever have his hands up, indicating in this fashion with both hands over his head, trying to protect himself? A. Never.

Q. Did you ever see him struck by anybody and fall over a chair? A. No.

Q. Did you strike him on the rear of the neck at any time? A. I did not.

1778

By the Court:

Q. Did anyone ever threaten to throw him out of the window or words to that effect? A. No.

Q. Anyone make any threats in your presence? A. No one at all.

Q. In any shape, form or manner? A. No, sir.

Q. Or kind? A. No, sir.

Cross-examination by Mr. Solovei:

Q. How old a man are you, Officer? A. Forty-one. 1779

Q. How tall are you? A. About five nine and a half, five ten.

Q. What do you weigh? A. 210.

Q. And you were one of the arresting officers in this case? A. I was.

Q. Where did you arrest Malinsky? A. We picked him up at New Lots and Snediker Avenue.

Q. You and who else? A. John McNally.

Q. Where did you take him from there? A. To the Bossert Hotel.

Q. Who was at the Bossert Hotel when you took him there? A. Lieutenant McNally.

Q. Anybody else? A. No, sir.

Q. While in the automobile driving from where you picked him up, up to the time you arrived at the Hotel Bossert, did you question the defendant? A. No, sir.

Q. Did not ask him a question at all? A. No, sir.

Q. Did you tell him what you were picking him up for? A. No, sir.

Q. Well, when you got to the Hotel Bossert, what floor did you get to? A. The sixth.

Q. What rooms did you occupy there? A. 608.

Q. You are connected with the District Attorney's office, aren't you? A. I am.

Q. I mean you are assigned there? A. That is right.

Q. Who arranged the renting of the rooms at the Hotel Bossert?

Mr. McGough: Objection.

The Court: Overruled.

Q. Do you know? A. That I don't know.

Q. Well, when you got to the Hotel Bossert, did you ask him questions there? A. Lieutenant McNally did.

Q. How long did Lieutenant McNally question him? A. I would say off and on all day.

Q. Did you question him at all? A. Yes.

Q. Who was with you when you made the arrest, you say? A. McNally.

Q. That is a brother of the Lieutenant? A. John McNally.

Q. Did he question him also? A. I presume so.

Q. When you say all day, do you mean from the time you arrived there a little after eight o'clock, until what time in the evening? A. I was in and out.

Q. Well, what time did you come back and remain there? A. Well, I got there, maybe 7:30, 8 o'clock. I was there maybe until 10 or 11, and I left and got back about 3 o'clock.

Q. In the morning? A. Yes. 1784

Q. The defendant was still being questioned? A. That is right.

Q. By the three of you or by other officers? A. Then when we left, Low and Celano, came back to the room.

Q. What was the first thing you did with the defendant when he arrived at the Hotel Bossert? A. We stripped him.

Q. Took all his clothes off? A. Yes, sir.

Q. While you were examining him and Lieutenant McNally and John McNally, he was actually stripped, is that correct? A. Well, he put his shorts right on again, I am pretty sure. 1785

Q. When was it he put his shorts on, do you remember? A. Not offhand, but it was not long he put his shorts on.

Q. Would you say it was around noon time? A. No; I left before that. I think he had them on before I left.

Q. In any event, the only thing he did put on was his shorts? A. That is right.

Q. He did not put his pants on nor his coat nor his shirt on? A. No.

Q. When you came back at three o'clock in

the morning he was still in his shorts? A. With a blanket wrapped around him.

Q. Getting kind of cold that night? A. It was not cold, but he was a little nervous.

Q. He told you he was not feeling well, didn't he? A. That is right.

Q. He told you he wanted a doctor, didn't he? A. I don't recall him calling a doctor. I think somebody got Bi-Sodol or something like that for him.

Q. Didn't you hear him tell Lieutenant McNally he wanted a doctor? A. I might not have been there at the time.

Q. Now, isn't it a fact, Detective Bell, that the defendant was struck by somebody around the stomach, with something, and the defendant picked his shirt up, and he said, "Please don't hit me again; I have a sick and sore body; that I received 25 skin graftings and if you hit me hard you are liable to kill me." Was there some talk like that? A. Not while I was there he did not have his shirt on, but I seen there was some kind of scars on his body and that he said he had received as a child from some kind of burns, scars. We asked him about the scars, but at no time was he struck by any one.

Q. That is, while you were there? A. While I was there.

Q. Now, on Saturday, was he still in his B.V.D.'s? A. No.

Q. Were you there when Assistant District Attorney Heffernan came in? A. Possibly. I am not sure.

Q. Did you see him there? A. I seen him in

the hallway or in the room. I seen him there some place.

Q. Saw him in the room some place? A. In the building I seen him.

Q. While you were there and saw Assistant District Attorney Heffernan there, did you see him question Malinsky? A. I don't remember being in the room when he was questioned by Heffernan. If he was questioned by him, I don't remember being in the room or being around there. If he was questioned by him I don't re- 1790
member being in the room or being around there if he was questioned by Heffernan or not.

Q. Did you see Heffernan? A. I seen him in the building, in the Bossert Hotel.

Q. How long was he in the room with Malinsky? Was it a long time? A. That I don't know.

Q. Would you say it was over an hour? A. I could not say. I don't know whether he was there when I was not there or whether he was there when I was there. There are two rooms and there was another room on another side. 1791

Q. How long was he there that you actually saw yourself, whether he came before or after? A. I may have just seen him in the hallway for a minute, I may have seen him in the room for ten minutes. I don't recall.

Q. You don't recall whether you saw him questioning Malinsky there? A. No.

Q. You won't say he did, you won't say he did not; is that correct? A. No; I would not.

Q. Would you? A. I would not.

Q. Your superior officer there was John McNally? A. Lieutenant McNally, James McNally.

1792 Q. James McNally, he was your superior officer? A. Yes.

Q. The moment you brought him there over to the Bossert Hotel he was the superior officer in charge of the case, is that right? A. Yes.

Q. In detaining or in arraigning or bringing a defendant before the Magistrate in any way was up to him, is that it? A. That is right.

Q. In any event, you did not bring him before any Magistrate, and did not arraign him, and
1793 he was not arraigned until October 27th, 1942, is that right? A. That is right.

Q. Was that the date he was arraigned, Officer, the 27th? A. It was.

Q. Were you one of the officers that took him to the Bath Beach Station House? A. I am not sure. I may have taken him. I know I went to Sing Sing that day.

Q. Were you at the Bath Beach Station House? A. I was.

Q. Did you go there with the other officers? A. I think I was down earlier in the afternoon.
1794 I am not sure, but I went down there positively at seven o'clock that night.

Q. What time did you leave the Hotel Bossert, or did the defendant leave the Hotel Bossert, do you know? A. I would say around two o'clock.

Q. The defendant left about two o'clock? A. Around that. I am not sure on that time.

Q. Did he leave with you? A. That is what I say, I am not sure. I went to Bath Beach.

Q. You are not sure whether you brought him out to Bath Beach or not, is that it? A. That is right.

Q. In any event, when you got to Bath Beach, you saw the defendant there? A. Yes.

Q. You got there, you say, about seven o'clock that evening? A. I did.

Q. Then while at Bath Beach Police Station, did you have the defendant in the squad room? A. Yes.

Q. It was not in a cell? A. No.

Q. In the squad room, there was Detective James McNally, and John McNally and yourself and Detective Celano and Acting Captain Dow- 1796
dell and many others, is that right? A. That is right.

Q. While in the squad room, at the Bath Beach Police Station, on the afternoon of October 27th, 1942, he was still being questioned by various police officers and detectives there, is that correct? A. I was not there at that time; I got there at seven p.m.

Q. I am talking about at seven p.m., after you got there? A. I don't know whether they were questioning him or not in the afternoon.

Q. I am talking about when you were there, 1797
I am not talking about when you were not there? A. You said, "the afternoon". I did not get there until seven o'clock.

Q. In any event at seven o'clock, after you got there? A. In the evening I was there, they were questioning him.

Q. Who was questioning him? McNally? A. Mr. Heffernan.

Q. Mr. Heffernan questioned him? What was that? About seven o'clock would you say? A. No; he admitted all the facts.

1798 *Det. James A. Bell, Jr.—For People—Cross*

Mr. Solovei: I move to strike out the answer.

The Court: Strike it out.

Q. I am asking you, when you got there about seven o'clock in the evening, you saw Assistant District Attorney Heffernan there, is that correct? A. Yes.

Q. And Assistant District Attorney Heffernan, in the squad room of the detective squad
1799 room at the 62nd Precinct, which is the Bath Beach Police Station, you saw Assistant District Attorney Heffernan questioning the defendant Malinsky; is that correct? A. I did.

Q. And Lieutenant McNally was there and John McNally and Dowdell and Celano, and several other detectives, is that correct? A. That is right.

Q. And that examination from seven o'clock continued until what time? A. I don't know. I would say maybe ten or eleven.

Q. Ten or eleven? A. Yes.

Q. You were there all the time, officer? A. I
1800 was not in the room with them all the time.

Q. You were in the station house all the time? A. I was in the station house.

Q. You were in and out of the room? A. Yes.

Q. What time was it that you actually saw the Assistant District Attorney Heffernan stop examining the defendant Malinsky, at the station house, on October 27th, 1942? A. Might have been 12 o'clock, might have been 11 o'clock, might have been one o'clock.

Q. You mean you cannot give the exact time? A. No.

Q. What time did you leave the station house? A. I did not.

Q. Stayed there all night? A. Yes, sir.

Q. Can you tell us what time Assistant District Attorney Heffernan left the station house? A. Possibly one o'clock.

Q. And it could have been 11 o'clock?

The Court: Let us find out about any beatings or any intimidations, please. Go ahead. 1802

By Mr. Solovei:

Q. Did anybody take any statement from the defendant Malinsky after 2 o'clock in the morning? A. The only statement I seen taken was by Mr. Heffernan. What time that is, I don't recall. It was late, though; might have been 11, 12 o'clock or so. I was coming and going all the time.

Q. The statement that you are talking about, and the only statement started when you were there are seven o'clock? A. No. 1803

Q. What time did it start now, do you say? A. I would say it started late. They were questioning him at the time; then we left for supper; we went out and ate.

Q. You did not permit the defendant Malinsky to communicate with his family, did you, his wife? A. No.

Q. With a lawyer or anybody at all, did you? A. That is right.

The Court: Of course, Mr. Solovei, there is nothing in the law which requires

the Police Department to permit counsel to be present at the time of questioning. That is right, isn't it?

Mr. Solovei: No, I don't agree with you, Judge.

The Court: That is the law. You take your exception to what the Court said.

Mr. Solovei: I except to your Honor's statement. I bow to your Honor's statement. However, I most respectfully dis-
805 agree with your Honor.

The Court: However, it is my statement that the jury will take.

Mr. Solovei: That is right.

The Court: And not yours.

Mr. Solovei: That is correct.

The Court: Proceed. However, I permitted you to show it so that the jury may consider it, as part of the whole picture on this point. But there is nothing in the law that says that a policeman is under any duty to send for the lawyer.

806 Mr. Solovei: I did not say that, your Honor.

The Court: Or to send for the family.

Mr. Solovei: I did not say that. I agree with your Honor there is nothing in the law on that. I did not say that.

The Court: The law does not require that, and the statement is not invalidated because the lawyer is not sent for or because the family is not sent for. That does not invalidate the statement. That is plain, isn't it;

Mr. Solovei: That is very plain.

The Court: That is right, isn't it.

Mr. Solovei: I am inclined to somewhat agree with your Honor, on that point; but that was not the reason I asked those questions. I think your Honor knows the reason why.

The Court: All right.

By Mr. Solovei:

Q. You know, don't you, Officer Bell, with your 1808
experience as a police officer, that defendant or a person arrested, charged with a crime, should be arraigned immediately before a Magistrate or as soon thereafter as possible? A. That is right.

Q. And from October 23rd, 1942, from the time you placed this defendant under arrest, until October 27th, 1942, he was not arraigned in any court; that is correct, isn't it? A. That is right.

Q. Isn't it a fact that you did give him a few back-hand slaps in the face when he told you that he knew nothing about the Fox murder? A. I or nobody else while I was in the room laid a hand on 1809
him.

Q. You were very anxious at that time to break the Fox case, weren't you? A. Just the same as any other case.

Q. And you were very anxious to break the Fox case because a cop's death was involved, isn't that correct? A. Yes.

Mr. Solovei: That is all.

Redirect examination by Mr. McGough:

Q. You were very anxious not to do anything

that would prevent that case from reaching a successful conclusion; isn't that correct? A. That is right. We did not want to spoil it.

JOHN McNALLY, Detective, shield No. 219, 66th Squad, called as a witness in behalf of the People, being first duly called by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Detective McNally, on the morning of the 23rd of October, 1942, did you pick up this defendant Morris Malinsky with Detective James Bell? A. I did.

Q. Did you take him to the Hotel Bossert? A. I did.

Q. Now, at any time while you saw him at the Bossert, did you strike him at any time? A. I did not.

Q. Did you see any other police officer or individual at all lay a hand on him or beat him? A. No, sir.

Q. Did he at any time while he spoke to you complain that he was being beaten by the police? A. He did not.

Q. Did any one in your presence threaten to throw him out of the window if he did not confess to killing Leon Fox? A. No, sir.

By the Court:

Q. Were any threats made of any kind, na-

ture or quality? A. There were no threats made against him at all.

Q. At any time while you were in his presence? A. That is right.

Cross-examination by Mr. Solovei:

Q. Well, you and Bell picked Malinsky up around his home, didn't you? A. That is right; a block away from his home.

Q. Did you put the handcuffs on him? A. 1814
Yes, sir.

Q. Placed him under arrest? A. Yes, sir.

Q. You took him to the Hotel Bossert, is that correct? A. That is right.

Q. When you got there you met your brother officer, Lieutenant McNally? A. That is right.

Q. And while in the automobile with Bell and Malinsky, did you ask Malinsky some questions? A. No.

Q. Did you tell him what you were picking him up for? A. No.

Q. When you got to the Hotel Bossert did 1815
you tell him why you were arresting him? A. I did not.

Q. When you got to the Hotel Bossert did you or your brother officers order his clothes removed? A. We did.

Q. Did you do it? A. Remove his clothes?

Q. Yes; remove his clothes? A. He removed them himself.

Q. You mean he just voluntarily removed them? A. Yes.

Q. He was stripped? A. For a short while, yes.

Q. How long did he remain stripped? A.

About five minutes. He was stripped, then he put his shorts on again.

Q. So that he was stripped just for about five minutes, is that right? A. Yes.

Q. Then he put his shorts on? You mean his B.V.D.'s? A. That is right.

Q. Did not put his pants on? A. No, sir.

Q. Did not put his coat and shirt on? A. No, sir.

Q. While at the Hotel Bossert did you ask him some questions? A. No; I was not doing the questioning.

Q. Did Lieutenant McNally ask him questions? A. He did.

Q. About the Fox case? A. He did.

Q. The defendant denied knowing anything about the Fox case, is that correct, at that time? A. When we first brought him in; yes.

Q. You and Bell and Lieutenant McNally were not satisfied with his answers, were you? Yes or no. A. Well—

Q. Yes or no, please?

The Court: No; I am not going to let him answer "Yes or no."

Mr. Solovei: I except to your Honor's ruling.

The Court: The question of being satisfied is a vague term.

Mr. Solovei: I except to your Honor's ruling.

The Court: (To the witness) Proceed. Answer the question the best way you can.

A. We kept on questioning him about it.

By Mr. Solovei:

Q. And while you were questioning him about it, the defendant Malinsky maintained his innocence, that he knew nothing at all about the Fox murder; is that correct? A. At that time.

Q. Isn't it a fact it was then that somebody struck Malinsky at the Hotel Bossert, and told him that they were not satisfied with his answers? A. No, sir.

Q. Now, you remained at the Hotel Bossert 1820
all day on the 23rd? A. I was in and out of the room.

Q. There were a great many other detectives that came there? A. Not at that time.

Q. What time did many other detectives come there? A. Oh, about eight p.m.

Q. Eight p.m.? A. That is right.

Q. When was it that Malinsky finally put his clothes on? What time? A. I don't remember.

Q. Would you say it was late in the evening or early hours of the morning? A. It was in the afternoon some time, I believe.

Q. He put his clothes on in the afternoon or 1821
about in the evening— A. In the afternoon or early evening.

Q. So that would you say from the time you brought him there, after he was stripped for about five minutes, he was then walking around with his B.V.D.'s? A. He had a blanket around him.

Q. And a blanket, to the early part of the evening; is that right? A. That is right.

Q. Did you see Assistant District Attorney Heffernan come there in the afternoon? A. Yes.

1822

Q. What time was it he got there? A. I don't know the time. Some time in the afternoon.

Q. Would you say it was about twelve o'clock, one o'clock, two o'clock? A. I don't remember what time.

Q. Can you give us your best recollection? A. I don't recollect any time.

Q. When he got there did he ask him any questions? A. I don't remember.

Q. You don't remember that? A. I don't

1823 remember if he did.

Q. Why is it you remember other instances and you don't remember this? A. I just don't remember it.

Q. Is there a reason for your lapse of memory? A. There is no reason.

Q. You have a pretty good memory? A. Fair.

Q. How long was Assistant District Attorney Heffernan in the premises? A. I don't remember that either, because I was in and out of the room; and I don't believe I saw Assistant District Attorney Heffernan leaving.

1824 Q. Did you at any time see Assistant District Attorney Heffernan sitting on the couch with the defendant Malinsky? A. I don't remember it.

Q. Were you there all the time while Malinsky was at the Hotel Bossert? A. No, sir.

Q. Did you go in and out of the Hotel Bossert continuously? A. Not continuously; in and out every once in a while.

Q. Did you take Malinsky from the Hotel Bossert to the Bath Beach police station? A. I was with him, yes.

Q. Did you go in a squad car with him? A.

Some car. It was not a squad car, I don't believe.

Q. It was an automobile in any event? A. Yes.

Q. What time was it you got to the Bath Beach police station on the 27th—or 26th, wasn't it? A. 26th.

Q. Yes. A. I believe it was around five or six o'clock in the evening.

Q. When you got to the Bath Beach police station on the 26th of October, 1942, was Malin- 1826
sky in the detectives' squad room? A. He was.

Q. Did you see Lieutenant McNally or other officers examine or question Malinsky then? A. He made his—

Q. I asked you a question: Did they examine him or question him on the 26th at the Bath Beach police station when you got there with him? A. No; I don't believe they did.

Q. How long did he remain in the detectives' squad room that night? A. Until about four a.m.

Q. Four a.m. in the morning? A. The 27th. 1827

Q. Was there an Assistant District Attorney there that day? A. Yes.

Q. On the 26th? A. 26th and the 27th.

Q. He was there on the 26th and the 27th? Who was the Assistant District Attorney that was there on the 26th of October, 1942? A. Mr. Heffernan.

Q. Did you see Assistant District Attorney Heffernan examine and question the defendant Malinsky on October 26, 1942, in the detectives' room of the Bath Beach police station? A. I did.

1828 Q. How long did that examination continue? A. Oh, approximately a half hour.

Q. You saw a stenographer there from the District Attorney's office? A. Yes, sir.

Q. And you saw him taking down the notes stenographically? A. That is right.

Q. What time was it that Malinsky was finally placed in a cell after you arrived at the Bath Beach police station? A. I believe about four a.m. October 27th.

1829 Q. Four a.m. the morning of the 27th, is that right? A. That is right.

Q. What time was it or when was it that Malinsky was finally booked on this case? A. Four a.m.

Q. Four a. m. of the 27th? A. That is right.

Q. What time was it that Assistant District Attorney Heffernan left the Bath Beach police station on the 26th of October, 1942? A. I don't remember.

Q. Do you know what time he got there? A. I told you before about five o'clock in the afternoon.

1830 Q. Can you tell us approximately what time he left, your best recollection? A. I cannot.

Q. Was he there until twelve o'clock that evening? A. I don't know.

Q. You were there, wern't you, Officer? A. I was there, yes; I don't remember.

Q. Is there any reason for your not knowing? A. No reason at all.

Q. Is there any reason for your memory not serving you at this time? A. I don't know the exact time. I am not going to give you any approximate times that Mr. Heffernan left.

1831

Q. You did not telephone for Assistant District Attorney Heffernan on the 26th? A. I did not.

Q. Was there any examination by an Assistant District Attorney of the defendant between the hour of one a. m. and two a. m. on October 27, 1942? A. I don't remember if there was or not.

Q. You cannot remember that? A. No.

Q. You do remember very clearly, however, that nobody struck the defendant, don't you? A. Yes, sir.

1832

Q. You remember that nobody made any threats to assault him, don't you? A. That is right.

Q. You do remember that nobody threatened to throw him out of the window, is that right? A. That is right.

Q. You do remember that he showed you the scar on his body, that he received as a youngster from some burns? A. That is right.

Q. But you cannot remember when Assistant District Attorney Heffernan left on the 26th of October, 1942, is that right? A. No, sir.

1833

Redirect examination by Mr. McGough:

Q. Mr. Solovei asked you if he made a statement to the District Attorney and stenographer on the 26th and then he asked you did he make a statement to the District Attorney and stenographer on the 27th. Did he make two statements, do you know, or did he make one statement? A. I said the District Attorney was there on the 26th and on the 27th.

1834 *John McNally—For People—Redirect*

Q. Was it about midnight of the 26th, the early morning of the 27th?

Mr. Solovei: Object to the question.

Q. If you remember.

The Court: Sustained.

By Mr. McGough:

1835 Q. Can you tell us whether Malinsky made one statement to the D.A. or did he make more than one? A. Made one statement.

By the Court:

Q. You are not certain as to the time when he made it? A. I am not certain of the time.

The Court: All right, step down.

By Mr. Solovei:

1836 Q. You told us he made a statement on the 26th and made a statement on the 27th? A. I said the District Attorney was there the 26th and the 27th.

The Court: We will take a short recess. Do not discuss the case; keep your minds open.

(After short recess. Trial resumed.)

DETECTIVE GEORGE LOW, shield No. 2200, 60th Squad, called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. The 60th Squad is the Coney Island squad? A. That is right. 1838

Q. When Detective Basch was transferred to another squad, was this case, the Fox investigation, handed over to you? A. It was.

Q. Now, did you see this defendant Morris Malinsky when he was picked up and brought to the Bossert on the morning of the 23rd of October, 1942? A. I did.

Q. While you were at the hotel, subsequent to that time, did you ever strike this defendant Morris Malinsky? A. I did not.

Q. Did you see anybody else in your presence strike him? A. I did not. 1839

Q. Did you ever have a complaint from him that anybody struck him either at the Bossert or at any other place? A. I did not.

Q. Did you or anybody else in your presence ever threaten to throw him out of the window? A. I did not.

Q. Were there times when you left the Hotel Bossert in connection with this case? A. There was.

Q. Did you bring one David Yellin to New York City at about that time? A. I did.

1840 *Det. George Low—For People—Cross—Redirect*

By the Court:

Q. Were any threats of any kind made in your presence? A. There was not.

Q. Any intimidation? A. No; there was not.

Q. Anybody threaten that he would be thrown out of the window? A. Nobody.

Q. Either in words or in substance? A. No, sir; no, your Honor.

1841 *Cross-examination by Mr. Solovei:*

Q. How old a man are you, Mr. Low? A. Forty-one.

Q. How tall are you? A. Five eleven.

Q. How much do you weigh? A. About 200.

Q. You were not one of the arresting officers in this case? A. I was.

Q. With Detective Bell? A. I was.

Q. Before we adjourned you were called as a witness here and then you left the court-room; is that correct? A. That is right.

1842 Q. You left the court-room with Detective Bell and Detective McNally right behind you; is that correct? A. That is right.

Q. You went around the side of the court-room here, around the hall, and you, Detective Bell and McNally and Lieutenant McNally were in a huddle; is that correct? A. That is right.

Mr. Solovei: That is all.

Redirect examination by Mr. McGough:

Q. Did you talk about anything when you were in a huddle; yes or no? A. Yes.

Q. Talk about the case? A. No.

1843

The Court: I have to pass on the admissibility of the proffered exhibits. I must ask a question.

By the Court:

Q. Were you the officer who was present at the time the defendant was arraigned in the Magistrates' Court? A. I was.

Q. Was the defendant brought before a magistrate? A. He was.

1844

Q. In open court? A. He was.

Q. Did the defendant make any complaint to the magistrate that he had been beaten? A. He did not.

Q. Or that he had been intimidated? A. He did not.

Q. Or threats had been made? A. No, sir; he did not.

Cross-examination by Mr. Solovei (continued):

Q. Do you know when it was he was arraigned in the Magistrates' Court? A. Yes; it was Tuesday morning, the 27th.

1845

The Court: I should say, in justice to the defendant, at this time, Mr. Solovei, that that is not conclusive against him. The cases so hold. But it is something that may be considered by a jury together with all the other evidence in the case.

By Mr. Solovei:

Q. You took him from the Bossert to the Bath

1846 Beach police station, didn't you? A. No; I did not.

Q. You were at the Bath Beach police station? A. I was.

Q. All day? A. No; I was not.

Q. A little while ago the Assistant District Attorney asked you whether or not while you were in the huddle in the hall, whether you spoke about this case and you hesitated and then your answer was "No", do you remember that? A.
1847 I do.

Q. Was the hesitation because you were in doubt as to whether or not something was said? A. It was not.

Q. You mean the three officers that testified before you, that you were in a huddle with in the hall of this court-room after we adjourned for a few minutes recess, did not say a word about their testimony was? A. They did not.

Mr. Solovei: All right; that is all.

Mr. McGough: That is all I have on
1848 this subject, Judge. There were only four officers named.

The Court: Please proceed.

Mr. McGough: I now ask that this People's Exhibit D marked for identification, be admitted in evidence and marked as an exhibit.

Mr. Solovei: I object to it, if your Honor pleases, upon the ground that the alleged statement was taken in violation of the statutes.

The Court: Certainly as to the point that the defendant was beaten and threat-

ened, that is a question of fact for the jury, there being conflicting versions. That is correct, isn't it? Now, as to the failure to arraign him, that is not conclusive against the People; that does not in and of itself invalidate the confession. The cases so hold. But it is a point to be considered by the jury on the question of the voluntariness of the confession; and I will charge them in proper fashion on that point when I come to charge the jury, if 1850
I submit the case to them. I will overrule your objection.

Mr. Solovei: Your Honor asked me a question and I remained mute. I don't know whether the stenographer got it or not. Whether I agreed with you on the proposition as to the beatings et cetera. I make my objection upon all the circumstances surrounding, from the time of the arrest up to the time the alleged statement was taken by the District Attorney, all of them. 1851

The Court: All of the circumstances referred to may be divided into two classes, namely: (1) The alleged beating and intimidation and threats; and (2) The failure to arraign, as required by the Statute. As to the first group there is a question of fact to be determined by the jury, and as to the second point that is also for the jury to consider. I hold that that does not in and of itself, as matter of law, invalidate the confession. Your objection is overruled.

Mr. Solovei: I except.

1852 *Colloquy*

The Court: Now then, I take it the alleged confession is about to be read.

Mr. McGough: I would like to have it marked and then read it.

The Court: Mr. Solovei, I have carefully considered the point that you raised yesterday in the absence of the jury. The Court has ordered that certain names be deleted from the alleged confession and that anonymous designations be substi-
1853 tuted in their places. I say to you now that I am not foreclosing you from supplying the names so deleted, at the proper time, if you be so advised, or if you deem that the names are of importance to the defense of your case. Proceed.

(The statement was marked in evidence People's Exhibit 13.)

Mr. Solovei: Of course, your Honor, at this time, for the record, which I feel in duty bound to do, I must respectfully
1854 object to the alleged confession going into evidence, and also as going into evidence as suggested by your Honor.

Mr. Geoghan: May I, just for the record, your Honor, not object to the statement but ask your Honor to instruct the jury that this confession will be binding only upon the one who makes it, and not upon Indovino.

Mr. Carabba: I make the same motion on behalf of the defendant Rudish.

The Court: I am going to make cer-

tain observations, and I am going to ask the jury to pay strict heed to what I say. You are about to hear an alleged statement read. The Court has together with counsel read that statement, and the Court is forewarned as to what it contains. You will hear read matters concerning a Mr. X and a Mr. Y. Those names, Mr. X and Mr. Y, have been substituted by order of the Court for names in the confession. Those names have been deleted by order 1856
of the Court from the confession; that is, names other than the defendant Malinsky and the defendant Beitler. You have no right to speculate as to who Mr. X and who Mr. Y are. Is that clear? You have no right to jump to any conclusions as to who Mr. X and Mr. Y are. As far as you know, it may be Christoper Columbus, it may be John Doe, it may be one of five or five hundred million people. Is that clear? You have no right to infer that the X and the Y referred to are 1857
either or both of the other defendants, namely, the defendant Rudish and the defendant Indovino. Now, I cannot impress that upon you too strongly. I believe my English is simple and it is understandable, and I am addressing you jurors in a forthright manner. I am going to conduct this case in the manner provided by law and in fairness to everybody concerned. Each defendant's case must be judged on its own merits, and only the evidence that applies to him

must be considered, and no other evidence. The jury has no right to guess or surmise. The jury's verdict must be based only on evidence. I have cautioned you in a manner that cannot be misunderstood. Now, when you hear this confession read the X and the Y are anonymous persons, and you have no right to even guess as to who they are. Can I say more than that, Mr. Geoghan? Can I say more than that, Mr. Carabba?

Mr. Carabba: Except to say, your Honor—I believe your Honor has covered it—that it only applies as against the person who is alleged to have made it.

The Court: Exactly. Is that instruction satisfactory.

Mr. Geoghan: It is very clear to me and I assume it is to the jury.

The Court: Is there anything else you desire the Court to do?

Mr. Geoghan: Nothing whatever. I think it is full and complete.

Mr. Carabba: Nothing whatever on behalf of the defendant Rudish.

The Court: You are both satisfied with the instructions?

Mr. Geoghan: Yes, your Honor.

The Court: Bring the stenographer back. I want the record clearly to show that I am asking the stenographer to be here on the witness stand so that if Mr. Solovei desires he may have the stenographer to supply the names deleted, if he desires to do that—at the proper time —not now.

Frank Maguire—Recalled for People—Direct 1861

FRANK MAGUIRE, resumes the stand.

Mr. McGough: May I proceed at this time to read it to the Court and jury, Judge?

The Court: Yes.

Mr. McGough: (Reading) People's Exhibit 13 in evidence, "Book No. 238, statement No. 21300. Statement of defendant Morris Malinsky, taken at the 62nd Precinct, Brooklyn, N. Y., on October 27, 1942, commencing at 2:10 a.m., by Assistant District Attorney Edward A. Heffernan. In re People against Morris Malinsky, et al. Charge, Murder in the First degree. Present: Captain John J. McGowan, Detective Charles Celano, both of the Homicide Squad. Acting Captain James Dowdell, Tenth Detective District. Lieutenant James McNally, Detective John McNally, Detective George Low, all of the 62nd Squad. Lieutenant George Loures of the 60th Squad. Detective James Bell, District Attorney's office. 1862 1863

"By Mr. Heffernan. FRANK MAGUIRE, Stenog.

"Morris Malinsky questioned.

"Q. What is your name? A. Morris Malinsky.

"Q. Where do you live, Morris? A. 714 Hinsdale Street.

"Q. In Brooklyn? A. Yes."

Mr. Solovei: Has your Honor got a copy of this before you?

The Court: I have not.

Mr. Solovei: I wish you had, because I am now going to make an objection.

The Court: Let me have a copy.

Mr. McGough: I have one copy besides the original, and I furnished that to counsel, Mr. Solovei.

Mr. Solovei: Of course, I have no copy I cannot follow it; but if you will look at this question that is asked—I have
1865 checked it off (handing copy to the Court) it would be an objectionable question, if the witness were called; and I object to it now.

The Court: Overruled.

Mr. Solovei: Exception.

"Q. Morris, I show you New York City Police photo No. 130,710 and ask you if you know the man whose picture is shown there? A. That is Beitler."

1866 Mr. Solovei: That is the question I objected to—so the record will show it.

The Court: Overruled.

Mr. Solovei: Exception.

"Q. That is Abe Beitler? A. Yes.

"Q. And I show you New York City Police, Photo No. 34,881."

Mr. Solovei: Same objection, your Honor, on that.

"Q. And I ask you if you know the subject of the photograph."

The Court: Let me see the answer to that.

(Handed to the Court.)

The Court: Objection overruled.

Mr. Solovei: Exception.

The Court: Start a little back so you have the continuity.

Mr. McGough: All right. I will repeat that question.

"Q. And I show you New York City Police Photo No. 34,881, and ask you if you know the subject of that photograph? A. That is X. 1868

"Q. X? A. Yes; I know him as X.

"Q. I show you New York City Police Photo No. 124,689, and I ask you if you know the subject of that photograph."

Mr. Solovei: To which I object.

The Court: Overruled.

Mr. Solovei: Exception.

"A. That is Y.

"Q. Y who? A. I knew him as Y." 1869

Mr. McGough: I will skip the next one. It is not a question.

"Q. Now, you recall February 15th, 1941, the night that Patrolman Fox was shot? A. Yes; that is right.

"Q. Now a few days before that, or some time before that, did you have any conversation with Beitler? A. Yes.

"Q. Concerning that incident? A. He did not tell me who it was; he just said a payroll.

'Q. Now, where did you have that conversation? A. I happened to bunk into him on Houston Street.

"Q. Near where? A. I think it was near Attorney.

"Q. On the street or in a store? A. On the street.

"Q. When was that conversation? A. What time of the day?

"Q. No, what day? How long before the kill-
1871 ing was it? A. About three days before.

"Q. Was anybody else present besides you and Beitler? A. No.

"Q. Now, tell me what conversation you had then? A. He says to me, could I get a car. I said, 'For what?' He said 'We've got a payroll to take.' So I said, 'I think I can get a car.' I did not tell him where or name the party I would speak to. I just said, 'Yeh, I think I can get a car.'

"Q. Did you have a car at the time? A. No.

"Q. What did he say about the payroll? A.
1872 He just told me a payroll; he did not tell me which.

"Q. He did not say where? A. No.

"Q. Nor when? A. He just said for Saturday night.

"Q. And that Saturday night would be February 15th, is that correct, 1941? A. That is right.

"Q. Did he say about where you were to meet him with the car? A. Yes.

"Q. Whereabouts? A. He told me to pick him up where I seen him that day, on Houston near Attorney.

"Q. Was there any other part of that conversation? A. No; nothing else.

"Q. When you say to 'take' a payroll, do you mean to steal it? A. To rob it.

"Q. Was anything said about any guns? A. No.

"Q. No plans were made at that time between you and Beitler as to who would bring the guns? A. He asked me if I could get any guns. I said, 'I think I can get some.'

"Q. Now what did you do after that with re- 1874
gard to this payroll? Did you talk to anybody else about it then? A. No.

"Q. Did you get a car? A. I seen X and I asked him to get a car for Saturday. He said, 'Yes'.

"Q. Where did you see X? A. On East 8th Street.

"Q. When? A. The next day. I think it was Thursday.

"Q. East 8th Street and where? A. Between C and D.

"Q. Was that a store? A. He lived on that 1875
block; there is a candy store there.

"Q. And was it at the candy store you had the conversation? A. I seen him outside of that candy store.

"Q. You told him to get a car for Saturday? A. Yes.

"Q. How was he to get the car? A. He said he could steal a car.

"Q. Now, did you have a conversation with anybody else about the stickup? A. No.

"Q. When did you next talk to Beitler or to

1876 *Frank Maguire—Recalled for People—Direct*

X about this robbery that you were to commit on Saturday night? A. When I got in the car.

"Q. When was that? A. Saturday night.

"Q. Where did you get into the car? A. On East 8th Street.

"Q. At what time? A. I would say about 8:30 or 9 o'clock, around that.

"Q. At night? A. Yes.

"Q. Who was in the car at that time? A. Just me and X.

1877 "Q. Who was driving? A. X.

"Q. Did you ask X where he got the car? A. He said he stole it.

"Q. Did he say where? A. No; he didn't say where.

"Q. What kind of a car was it? A. The night I seen it it was a Ford.

"Q. What kind of a Ford? A. With a canvas roof.

"Q. Did you go to the Property Clerk's room of the Police Department today? A. Yes.

"Q. Did you there inspect an automobile? A.

1878 Yes, sir.

"Q. Was that the same automobile that was used by X and you to go to the stickup on February 15, 1941? A. Yes.

"Q. Was there something about that automobile that fixes it in your mind? A. I remembered it tonight too; the right-hand knob on the door in the back was hard to open.

"Q. And you tried it tonight and it was in the same condition? A. Yes.

"Q. That is the same car that was used in the stickup? A. Yes.

"Q. Now there were X and you on East 8th Street? A. That is right.

"Q. What happened next? A. We went and picked up Beitler.

"Q. Where? A. On Houston Street near Attorney.

"Q. Was anything said at that time as to guns? A. No, sir; he had a package with him and he got in the car.

"Q. What kind of a package? A. In newspaper. 1880

"Q. Was anything said about what was in the package? A. Well, I surmised what was in it.

"Q. X continued to drive? A. Yes, sir.

"Q. What seat did you sit in? A. First I was in the front, then Beitler said, 'Get in the back,' and I jumped over the seat and got in the back.

"Q. And you sat in the back seat alone? A. Yes.

"Q. And Beitler sat opposite X? A. Yes.

"Q. Where did you go after that? A. Straight 1881 to Coney Island.

"Q. Whereabouts did you go in Coney Island? A. Next door to the movies we stopped first and we had coffee in the restaurant.

"Q. Now, did you on October 25, 1942, go to Coney Island with the detectives and show them that particular restaurant? A. Yes.

"Q. It was the Cosmo Restaurant? A. Yes, sir.

"Q. Who went into the restaurant? A. The three of us.

1882 "Q. You and X and Beitler? A. That is right.

"Q. What did you do with the car when you went in there? A. It was outside.

"Q. On Surf Avenue? A. Yes.

"Q. Where were the guns then? A. In the car.

"Q. Did you talk to anybody in the restaurant, with any friends or anybody there? A. No.

"Q. You had coffee there? A. Yes.

1883 "Q. What time did you leave the restaurant? A. It would be a little after ten.

"Q. What did you do then? A. We went down near the bank.

"Q. You got into the car again? A. Yes.

"Q. Down near the bank? Where was that bank? A. I don't know what street that was.

"Q. Did you go to the same bank and point out to the officers what street you were on, on October 25th of this year? A. Yes, sir.

"Q. That was to West 12th Street you went, is that right? A. I don't know what street

1884 it was.

"Q. And you recognized the same bank? A. Yes.

"Q. Now, when you went around to that street, will you tell me in what direction your car was parked? A. It was parked facing where we rode across the street. What is that, Surf Avenue?

"Q. Facing towards the water or away from the water? A. Away from the water.

"Q. In the direction of Surf Avenue? A. Yes.

"Q. And how far down the block was that car

parked? A. Where we were parked yesterday. I don't know how many feet.

"Q. Was it about 25 feet north of the Bowery? A. About that.

"Q. Was the car parked against the curb or towards the middle of the road? A. I would say it was a little away from the curb.

"Q. Now, when you came to a stop there did they leave the lights on the car? A. No.

"Q. Did they have the motor running? A. Yes, but we were waiting there for a while until 1886
we seen the messenger.

"Q. How long were you waiting? A. It looked like a long time to me because we were waiting there.

"Q. Well, how long would you say it was? Ten, fifteen or twenty-five minutes? A. Maybe half an hour, three-quarters of an hour, something like that.

"Q. Now, did you remain in the car? A. Yes; Beitler got out of the car and I stayed in the car.

"Q. Where did Beitler go when he got out 1887
of the car? A. He walked towards the corner.

"Q. Towards Surf Avenue? A. Yes.

"Q. What did he do when he got down there? A. He was standing there; then a couple of minutes later he waved his hand to me to get out.

"Q. To get out of the car? A. Yes. I jumped out and I seen the cop walking with the messenger, and I seen him come running up.

"Q. Now, before Beitler got out of the car did anything happen to that package that he had there? A. He opened the package before he got

out of the car and he handed me two guns and he took two.

"Q. What kind of guns did he hand to you? A. One like a .45 and one like a .32.

"Q. Was your .45 an automatic or a revolver? A. It was no automatic.

"Q. It was a revolver? A. Yes.

"Q. And what did the other one look like? A. Also a revolver.

"Q. And what calibre uld that be? A.
1889 Which one?

"Q. The smaller. A. About a .32 I think it was.

"Q. So you had two guns? A. Yes.

"Q. And those guns were loaded? A. I did not even look at them, to tell you the truth.

"Q. Now, did Beitler have any guns? A. He had two with him also.

"Q. Do you know what kind he had? A. They were like a .38, something like the police guns.

"Q. Both the same? A. Yes.

1890 "Q. Was either one an automatic, do you know? A. I don't think so. Maybe one was and maybe one was not; I ain't sure.

"Q. But you say one looked like a .38? A. They both looked like .38.

"Q. Did Beitler take those guns with him when he went towards the corner? A. Yes.

"Q. Then Beitler called you out of the car, you say, and you saw two men approaching? A. Yes. As I got out of the car, all of a sudden I seen him come running up and the next thing I heard shots. I turned around and ran back to the corner and I seen the officer falling.

"Q. When you say 'the officer' was he a police officer? A. Yes.

"Q. You recognized him as a police officer? A. Yes.

"Q. He was in uniform, is that correct? A. Yes.

"Q. He fell, and what happened? A. Then the man started to run, so he said, 'Stop or I'll shoot.' He ran after him and he grabbed the bag.

"Q. Who ran up to him? A. Beitler. 1892

"Q. How many shots would you say Beitler fired? A. I don't know. Maybe two or three, I ain't sure. I got scared and I ran back to the car.

"Q. Did the officer fire any shots? A. I think I heard a shot coming back. I ain't sure.

"Q. It might have been more than one shot? A. I don't know. I heard shots and I got scared and ran.

"Q. You ran back to the car? A. Yes.

"Q. Did you see Beitler go after the man who had run away, the civilian? A. Yes, because when I got to the car I thought he was in back of me, and I saw he wasn't and the next thing, I heard him say to the man, 'Stop or I'll shoot,' and he grabbed the bag and I seen him come running back. 1893

"Q. What happened to the man who was running away then? A. He grabbed the bag and Beitler came running back, and X shot away with the car.

"Q. Do you know whether Beitler grabbed the bag from the man's hand? A. I seen him run back with the bag in his hand.

"Q. Did you see him actually take the bag from the man? A. I don't know whether he took it from him or the man dropped it.

"Q. This man was not an officer, was he? A. No.

"Q. Was this the man whom you had seen approaching with the officer when Beitler called you out of the car? A. That's right.

"Q. Now, after Beitler got into the car did he have the bag with him? A. Yes.

1895 "Q. And that left you and Beitler in the car and X still at the wheel? A. That is right.

"Q. What happened then? A. Then he shot away. I bent down.

'Q. You mean the car was driven fast? A. Yes. And I bent down.

"Q. In which direction was the car going? A. I think he shot across the street.

"Q. Across Surf Avenue? A. Yes. Then I heard him holler, 'Let me jump. Slow down, let me jump,' and he jumped first and I jumped after him.

1896 "Q. When you said you bent down, what position were you in? A. In a crouch.

"Q. Crouched down? A. Yes.

"Q. Could you see what street you were going on? A. No.

"Q. How far did you go? A. It seemed a matter of only a few blocks.

"Q. Who got out of the car first? A. Beitler; then I went after him.

"Q. Do you know where it was that you got out of the car? A. No; I don't remember where that was.

"Q. Now, when you got out of the car what

did you do then? A. We seen a cab coming along and we jumped in the cab.

"Q. Do you know whose cab it was? A. No.

"Q. Do you know the name of the driver? A. No.

"Q. You and Beitler got into the cab? A. Yes.

"Q. Did X get in with you? A. No; he drove away with the car.

"Q. With the stolen car? A. Yes.

"Q. And where did you and Beitler go with 1898
this cab? A. To New York.

"Q. All the way over to New York? A. Yes.

"Q. Whereabouts in New York? A. 4th Street and Avenue C. I jumped out there.

"Q. Now while you were in the cab what did you do? A. He gave me the silver and he gave me bills. He gave me about $150.

"Q. Where did he get that money? What did he take it out of? A. Out of a bag.

"Q. What kind of a bag was it? A. It looked like a canvas bag.

"Q. I show you this picture and ask you if 1899
this is a picture of a bag similar to that Beitler had in the car? A. It looks something like that.

"Q. What was the bag made of? A. It was a canvas bag like a cloth bag—canvas or cloth.

"Q. Did it have a lock on it? A. I did not notice it.

"Q. How did Beitler open it? A. I think he cut it open.

"Q. With a knife? A. Yes.

"Q. Did you see him use the knife? A. I seen him put the knife in his pocket. I guess he must have used it on the bag.

1900 "Q. In what form was the money that he gave you? A. Silver, also bills.

"Q. How much in silver? A. About fifty, sixty or seventy. It was a load of silver.

"Q. And how much money did he give you in bills? A. The rest he gave me in bills. I had a hundred and fifty dollars altogether.

"Q. Including the silver? A. Yes.

"Q. How was that silver, loose or wrapped? A. Wrapped up.

1901 "Q. Did you notice the color of the wrappings? A. No, sir; I did not take notice.

"Q. Is this the kind of wrapping (indicating a saimon colored wrapper for quarters)? A. Something like that.

"Q. You don't know whether it was the same color as this? A. I don't remember what color no more.

"Q. Where did you go to in New York? A. Beitler went away himself and I went away too.

"Q. Where did you get out of the cab? A. 4th Street and Avenue C.

1902 "Q. What is there? A. There used to be a club over there.

"Q. What is the name of it? A. Citadel Club.

"Q. Did you go up into the club? A. No, sir; I went to First Avenue.

"Q. What is there at First Avenue where you went? A. I used to work there at a house furnishing place.

"Q. And you went directly to the place you used to work at? A. Yes.

"Q. What address is that on First Avenue? A. I think it is 167.

"Q. Who was the owner of that place? A. Max Rauch.

"Q. Now when you went there did you see Max Rauch there? A. Yes, sir.

"Q. And what did you do then? A. I walked straight to the back of the store and started opening the wrappers.

"Q. The wrappers on the coins that Beitler had given to you, correct? A. Yes, sir.

"Q. What did you do then? A. Then after, I called him in the back and showed him how 1904
much change I had.

"Q. You told whom? A. Rauch. He said, 'Where did you get it?' I said, 'I won it in a crap game.' So I says to him, 'Will you give me bills for it?' He says, 'Yeah'. He did not have it all that night, so he gave me some during the week.

"Q. Now, he did give you bills for it? A. Yes; he gave me bills.

"Q. Did you have any conversation with Beitler about this case afterwards? A. The next time I seen him was the next summer. He was riding 1905
by in a car with some fellows and he blew the horn and waved to me and kept going.

"Q. Do you know what happened to the bag? A. No, sir.

"Q. Do you know what happened to the guns? A. No, sir.

"Q. Now, after you left the scene of the shooting, what did you do with the guns that you had? A. I gave them back to him while we were in the cab.

"Q. You never saw the bag any more? A. No, sir.

"Q. Did you ever see the guns any more? A. No, sir.

"Q. Now did you meet X again after that? A. Yes, sir.

"Q. Did you have a conversation with him about the affair? A. No, sir.

"Q. Did you ever ask him how much he got? A. No, sir.

"Q. Did Beitler tell you anything about what disposition he made of the rest of the money?
1907 A. He said to me, 'Here is a hundred and fifty dollars.' He said, 'Maybe there is more.' He said, 'I want to send some to this guy in the can,' and that is all.

"Q. Did he mention who the person was in prison? A. No.

"Q. The person that he was going to send it to? A. No.

"Q. Did he say he was going to give any to anybody else? A. He said he has got to give some to the tipster.

"Q. Who was the tipster? A. While riding he
1908 says to me, 'Because he gave this to me, I'll give him some.' I said, 'Who?' He said, 'Y'.

"Q. By that he meant the one who tipped him off for the job? A. Yes.

"Q. Did he say how much he was going to give Y? A. No, sir.

"Q. How about X? Did X get a share of the money? A. He must have got it: he must have seen him later on.

"Q. You don't know about that? A. No, sir.

"Q. Now, going back to the scene of the shooting, you had two guns in your hand? A. That is right.

"Q. Did you fire any shots? A. No, sir.

"Q. Are you sure of that? A. Not that I know of, I did not fire any.

"Q. You had both guns out? A. Yes; and then when I heard the shooting, I put them in my pocket and jumped into the car.

"Q. When you say, 'Not that I know of,' do you mean it is possible you might have fired some shots without realizing it? A. I can't say.

"Q. You are not sure whether you did or not? A. I did not feel my hand move or anything. 1910

"Q. Now when you went from New York to the scene of the shooting were you wearing a hat? A. Yes, sir.

"Q. What kind of a hat? A. A brown hat.

"Q. Is this the hat you were wearing? A. It looks like it."

The Court: Now, will you just pause a moment. Mr. Maguire, was a hat exhibited to the defendant at the time?

The Witness: There was, your Honor.

The Court: At this point? 1911

The Witness: At this point. It is referred to in the next question.

Mr. McGough: I will read that question to continue, Judge.

"Q. Is this the hat you were wearing? A. It looks like it.

"Q. Will you look it over and see (handing it to the witness). A. It looks like the hat. Yes, this is the hat.

"Q. Where did you get that hat? A. From some fellow, Harry Levine.

1912 "Q. Do you know where Harry Levine lives? A. I know he lived in Brownsville somewhere.

"Q. Now, I show you New York City police photo No. 139650, and ask you if you recognize the subject of that photograph?"

Mr. Solovei: I object to the question.
The Court: Overruled; exception.

"A. Yes; Harry Levine.

1913 "Q. Is that the boy who gave you the hat? A. Yes.

"Q. And how long before the 15th of February, 1941, did he give you that hat? A. I must have got it a week or two before that.

"Q. And you were wearing that hat at that time? A. Yes, sir.

"Q. Now, when you were getting into the car, after Beitler had fired the shots, as you say, did you have the hat on? A. I don't remember whether I had it on or not, I was so excited.

"Q. But you had it in the car with you? A. When I went there I had it on.

1914 "Q. And when you left the car did you have it with you? A. I didn't.

Q. Now, do you know at which point you lost the hat? A. No, sir.

"Q. But you know that when you got to Coney Island you had this hat? A. Yes.

"Q. And when you left Coney Island immediately after abandoning that car you did not have it any more? A. No, sir.

"Q. So that it was some time between the time that the stickup occurred and the time that you abandoned that car a few blocks from there, that you lost the hat? A. Yes, sir.

"Q. Will you put your initials inside of the hat? A. Put it where?

"Q. Just inside the sweatband. A. (Witness complies).

"Q. That is 'M.M.' which you have written in pen and ink on the inside of this sweatband? A. Yes, sir.

"Q. What denominations were the silver coins? A. I think it was all halves and quarters.

"Q. Now, you are making this statement voluntarily to me? A. Yes, sir. 1916

"Q. Nobody forced you or did anything to you, did they? A. No.

"Q. How have the police treated you since you have been with them? A. All right.

"Q. Nobody did anything wrong to you, did they? A. No."

The Court: Where is that hat?
(Hat handed to the Court).

By the Court:

Q. I show you People's Exhibit B, and ask you to examine it. A. (After examining it) This is it. 1917

Q. That is the hat that the defendant marked in your presence? A. Yes, your Honor.

Mr. McGough: At this time I would like to offer People's Exhibit B marked for identification, in evidence.

Mr. Solovei: I object to it.

The Court: Overruled.

Mr. Solovei: Exception.

Mr. Carabba: I object as to Rudish.

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The Court: Objection overruled.

Mr. Carabba: Exception.

The Court: Mark it. The hat is marked in evidence.

(Marked People's Exhibit No. 14).

The Court: Mr. Foreman and gentlemen of the jury: The court is about to take a recess for luncheon. I admonish
1919 you not to discuss the case among yourselves or with any other person or permit anyone to speak to you about this case or discuss it in your presence. You must keep your minds open. Do not form or express any opinion or conclusion as to the guilt or innocence of the defendants on trial or either of them or any of them until the case is finally submitted to you for your consideration, after a charge on the law. You may retire and return at 2:15.

1929 (The jury retired from the room).

The Court: Do you want Mr. Maguire to return here?

Mr. Solovei: I do not.

The Court: Do you want to ask him any questions?

Mr. Solovei: No, sir.

The Court: Do you want to ask any questions, any further questions as to the deleted names; yes or no?

Mr. Solovei: No, sir; I stand on my objection.

AFTER RECESS. TRIAL RESUMED

CHARLES P. CELANO, Detective-Police Officer, City of New York, Shield No. 361, attached to the Homicide Squad, Brooklyn, N. Y., called as a witness in behalf of the People, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

1922

Q. How long have you been a member of the Homicide Squad of Detectives? A. About 15 years.

Q. Were you on the tour of detectives that were working under Lieutenant McNally's direction? A. Yes, sir, I was.

Q. About October 1942, on this case? A. That is right.

Q. Were you present at the time that Malinsky made a statement to Mr. Heffernan down at the 62nd Squad, I think it was, on October 27, 1942? A. I was.

1923

Q. Were you present when he stated that he went to a police garage—

Mr. Solovei: I object to the question.
The Court: Finish the question.

Q. —and picked out a certain automobile?

Mr. Solovei: I object to the question.
The Court: Objection overruled.
Mr. Solovei: Exception.
The Witness: I was.

1924

Charles P. Celano—For People—Direct

By Mr. McGough:

Q. Do you know who took him to the police garage? A. Yes, sir.

Q. Who? A. Myself and Detective McNally; John McNally.

Q. Where was this garage located? A. It was located under the Meeker Avenue Bridge in Brooklyn. That is a police property garage.

Q. And what date did you take Malinsky
1925 there with McNally? A. It was on a Monday. I think it was October 26th, I believe.

Q. Will you tell the jury what took place when you took Malinsky to that Property Clerk's Garage at that time? A. We took Malinsky in there and I asked Malinsky to walk ahead. There is about 150 or 200 cars in the garage. I said, "Walk ahead by yourself and look at these cars"; so after looking at a number of them, probably 100 or 150 of them; I don't know how many they were, he looked at a car in the corner and he said, "That looks
926 like the car"; so I said, "What makes you think so?" He said, "Well, it has got a canvas top", but he said, "Let me make sure".

Q. It looks like what car? A. It looks like the car that we are looking for; the car that was used in this case," and it was stored there as evidence, so I asked him, I said, "Walk over there." He said, "I believe that the rear door was sticking at the time and I could not get out so I had to climb through the front right door to get into the back and get out the same way, from the back to the front"; so he got to the car and opened the door on the left side, the

rear door, and he went in and he could not open the rear right door, so he comes back to me and he said, "That is definitely the car."

Q. Did he say anything else besides "That is definitely the car"? A. I don't remember now. He said, "That is definitely the car", he said that he was in, that was used in the case.

Q. What else did he say about the case; anything?

1928 The Court: Officer, now turn around and face me. I am going to speak to the Officer in a voice that is not audible to the jury.

(The Court speaks to the Officer.)

(The Court requested the stenographer to come up before the Bench and dictated the following on the record: "I have just instructed the Detective that if he had any conversation with Malinsky, and Malinsky involved the names of the other defendants, that he should omit reference to the names of the other defendants.)

1929 The Court: Would you gentlemen like to hear what I said to the stenographer. Any counsel may come up and have the stenographer read what I have just put on the record.

(Mr. Geoghan, Mr. Carabba, Mr. Solovei and Mr. McGough appear before the Bench and the stenographer read the above to the respective counsel not in the hearing of the jury.)

(The following was had in the presence of the jury.)

Mr. McGough: Will you repeat the last question, please? And will you listen to it?

(The question was repeated by the stenographer as follows: "Q. What else did he say about the case; anything?")

Q. He said that was the car, you told us? A. Yes, that is right.

Q. Did he say anything else? A. He just said
1931 that that was the car that was used.

Q. When? A. On February 15th, in the killing of the policeman in Coney Island.

Q. Now were you down at Stillwell Avenue between Mermaid Avenue and Neptune on the night in question, February 15, 1941? A. I was.

Q. Did you see the same car there? A. I did.

Q. Now were you present at any time with this defendant Malinsky at West 12th Street and Surf Avenue? A. I was.

Q. What date? A. I think it was about 6 p. m. on October 25th. It was a Sunday—I think it was the 25th, on Sunday.
1932

Q. What year, please? A. 1943—no, 1942.

Q. Did you take the prisoner there? A. I did not get you.

Q. Did you take Malinsky there at that time? A. I did.

Q. Where did you start out from? A. We started from down town, the Hotel Bossert.

Q. Tell us where you started from. A. We started from down town, the Hotel Bossert in Brooklyn, and we proceeded and we went to Prospect Park. We entered Prospect Park, and all the way down Ocean Parkway.

Q. Who directed the chauffeur? A. In an automobile, and Malinsky directed the chauffeur as to what he wanted done. We went through Ocean Parkway into Surf Avenue, as far as the Cosmo Restaurant, which is next to the Loew's Theatre.

Q. Which Loew's Theatre? A. In Coney Island, on Surf Avenue.

Q. And where? A. I believe 15th Street.

Q. Was it on the corner of Surf Avenue and Stillwell Avenue, the Loew's Coney Island Theatre? A. Yes, it was on the other side of Loew's Theatre, next to Loew's Theatre. 1934

Mr. Solovei: May I ask that this witness not be led?

The Court: Proceed.

By Mr. McGough:

Q. You say the Cosmo was next to the Coney Island Theatre? A. That is right.

Q. I am asking you where the Coney Island Theatre is? It is on Surf Avenue and what? 1935
A. I believe it is West 15th Street.

Q. Isn't it Stillwell Avenue? A. Stillwell Avennue; they call it.

Q. Now continue. A. They said that they parked the car there.

Q. What did Malinsky say? A. He said that he parked the car there and went into the restaurant to have coffee. They came out and they proceeded to West 12th Street and went towards the boardwalk. They turned around and parked the car just a little ways down from the

1936 Brooklyn Trust Company which is located on the corner of West 12th Street. After they were there, they waited.

The Court: Do you want to go any further than that?

Mr. McGough: No, I think that is enough for the time being.

The Court: Proceed.

1937 By Mr. McGough:

Q. Just answer this, Yes or No. Did he tell you some of the things of what happened in Coney Island? A. He did.

Q. With reference to himself and some others? A. He did.

Q. Were you present when this defendant Malinsky marked a hat which is now marked in evidence People's Exhibit 14? A. I was.

Q. And were you there when he said he got that hat from Harry Levine?

1938 Mr. Solovei: I object to the question.

The Court: Yes, it is leading.

Mr. McGough: I will reframe the question.

The Court: Proceed.

By Mr. McGough:

Q. At any time did you hear Malinsky mention Harry Levine's name in connection with a hat?

Mr. Solovei: I object to the question.

The Court: Objection overruled.
Mr. Solovei: Exception.
The Witness: I did.

Q. Now did you make an investigation, Detective Celano, to ascertain the whereabouts of Harry Levine? A. I did.
Q. What did your investigation reveal?

Mr. Solovei: I object to it.
The Court: I take it that you are trying to account for the failure to produce the witness? 1940
Mr. McGough: Yes, the nonappearance of a witness.
The Court: Objection overruled.
Mr. Solovei: I object to it upon the further ground, if your Honor pleases, that there is no foundation laid by this witness that he ever knew any Harry Levine or the Harry Levine more particularly who was the owner of this particular hat.
The Court: Objection overruled. 1941
Mr. Solovei: Exception.
The Witness: We went to visit Harry Levine's sister.
Mr. Solovei: I object to it.
The Court: Objection overruled.
Mr. Solovei: Exception.

By Mr. McGough:

Q. Don't give us any conversation, please. A. We had a conversation with her and she said—

1942 *Charles P. Celano—For People—Direct*

Mr. Solovei: I object to it.
The Court: Objection overruled.
Mr. Solovei: Exception.

By Mr. McGough:

Q. I said, don't give me any conversation.

The Court: I will let you show the conversation about the whereabouts of Levine.

1943

By Mr. McGough:

Q. All right. A. She stated that her brother is in the United States Army and at the present time is stationed in England.

Q. Now since the month of June have you continued your investigation to ascertain whether Levine is still in England? A. We have, sir.

Q. And tell us what you have done and what you have seen, if anything, please. A. We fur-

1944 ther learned—

Mr. Solovei: I object to this line of testimony, if your Honor pleases, upon the ground that there is no testimony here by anybody that the Harry Levine is the person who was the owner of this hat or is the same Harry Levine that we are talking about during the course of the trial.

Mr. McGough: I will supply that information, Judge, at this time.

The Court: Proceed.

Mr. McGough: May I have this marked for identification?

The Court: Yes.

(Paper received and marked People's Exhibit E for Identification.)

By Mr. McGough:

Q. I show you People's Exhibit E marked for identification and ask you if that picture was shown to Morris Malinsky by Mr. Heffernan in your presence on October 27, 1942, at the 62nd Precinct? A. It was. 1946

Q. And that bears a certain number, 139650, does it? A. That is right.

Q. Did you hear Mr. Heffernan question this defendant with respect to that picture? A. I did, sir.

Q. Will you tell us what Mr. Heffernan said and what, if anything Malinsky said with respect to that picture marked People's Exhibit E for Identification? 1947

Mr. Solovei: May I get the time and place, please?

Mr. McGough: I just gave you the time.

Mr. Solovei: What date was it and where?

By Mr. McGough:

Q. I asked you if this was on October 27th

1948

at the 62nd Precinct, is that right? A. That is right.

Q. Will you answer my question? A. Mr. Heffernan showed Malinsky the photograph and he said, "That is Harry Levine. I borrowed a hat—Harry Levine gave me the hat" that we found and he marked it for identification at the time in the Precinct.

1949

Mr. McGough: May I offer that in evidence, please?

The Court: Mark it.

(Photograph received and marked People's Exhibit 15.)

Mr. McGough: I would like to read one thing from the exhibit, Judge.

The Court: Yes.

Mr. McGough (reading): New York, Police, 139650; 11/15/37.

1950

By Mr. McGough:

Q. That is a police photograph, is that right? A. That is right.

Q. And of course being a police photograph, there are certain records over in Headquarters, of the man whose picture is on that particular exhibit? A. That is right.

Q. Now in the course of your investigation, you had addresses of this man, did you not? A. Yes, sir.

Q. I asked you a little while ago; did your investigation continue on down through the month of June, this month? A. Yes, sir.

Q. And can you tell us what your investigation showed with respect to the present whereabouts of this young man?

Mr. Solovei: I object to it.

The Court: On what ground?

Mr. Solovei: Upon the ground that the proper foundation was not laid yet.

The Court: In what respect?

Mr. Solovei: In respect that the picture that he evidently showed this witness 1952
is an old photograph taken at Police Headquarters.

The Court: How do we know it is old? How do we know how recent it is?

Mr. Solovei: All the more reason why I object to it.

The Court: What is your point?

Mr. Solovei: That the proper foundation has not been laid to show that this witness knows what Harry Levine he is talking about.

The Court: In what respect? 1953

Mr. Solovei: I don't intend to tell the District Attorney how to present the facts.

The Court: I want to know the point of your objection.

Mr. Solovei: I say in my opinion that they have not laid a proper foundation.

The Court: In what respect?

Mr. Solovei: That is my opinion. That is why I object.

The Court: Have you any grounds to state why you object?

Mr. Solovei: I have no further grounds to state.

The Court: Objection overruled.

Mr. Solovei: Exception.

The Court: That is the sole basis of your objection, that the picture has not been properly identified as being the man named Harry Levine, whom the defendant is alleged to have spoken about?

Mr. Solovei: And also that it comes within the purview of the confession that I objected to before just mentioned.

The Court: That has been admitted.

Mr. Solovei: I say that this is just part of the objection; also upon the ground that it is incompetent, immaterial and irrelevant, and not binding upon the defendant Malinsky.

The Court: Objection overruled.

Mr. Solovei: Exception.

The Witness: The investigation was further conducted and I spoke to the sister and the sister said that her brother is at present confined to some hospital in England somewheres; she did not know where.

Mr. Solovei: I move to strike the answer out.

The Court: Motion denied.

Mr. Solovei: Exception.

Q. Of what date?

By the Court:

Q. Did you show the sister this picture? A. I did.

Q. Did she identify this picture as being of her brother Harry Levine? A. Yes, sir.

The Court: Proceed.

By Mr. McGough:

Q. What date was that, please, that she had received that word? A. I think we had that talk with her on May 17th.

Q. Not the time you had the talk with her; what time did she tell you she received that word as of what date he was in England? A. Some date in May and as recently as this past week I think. 1958

By the Court:

Q. Have you got the address of the sister? A. Yes, sir.

The Court: Bring her here. Go out and bring her in.

Mr. McGough: Your witness. 1959

Cross-examination by Mr. Solovei:

Q. I understood you to say that the conversation you had with respect to the car was October 25, 1942? A. That was the night we went to the garage; I believe on Monday night.

Q. I am asking you a question. A. Yes, that is right.

Q. And you said that this conversation was had at the Hotel Bossert? A. Oh, no.

Q. Where was it that he told you that this car,

1960 using your language, was definitely used in the Fox case? A. In the Meeker Street garage.

Q. You left from the Hotel Bossert, is that correct? A. That is right.

Q. When you left, was the Assistant District Attorney there, Heffernan? A. He was.

Q. That is Sunday, October 25, 1942, is that correct? A. Is that going to the garage?

Q. Was he there at the Hotel Bossert before you left? A. You mean, going out to Coney
1961 Island, Counselor? Now, there is a couple of dates there. You mean going down to Coney Island? Yes, that was a Sunday night.

Q. You went to Coney Island on Sunday night? A. That is right.

Q. Was the Assistant District Attorney at the Hotel Bossert before you left for Coney Island? A. I don't recollect whether we picked him up or he was there.

Q. Did he go along? A. He went along with us.

Q. And did the stenographer go along, too,
1962 from the District Attorney's office? A. I believe he did.

Q. And you took Malinsky down to Coney Island and he told you something about being in the Cosmo Restaurant and where he parked the car, is that right? A. That is right.

Q. And did he tell you that while you were in the automobile after leaving Coney Island, or did he tell you that while you were on the sidewalk talking to him? A. No, he took us right to the restaurant. He said, "This is the restaurant we had coffee."

Q. Did the stenographer take down what was said? A. I don't think so.

Q. Did Mr. Heffernan order the stenographer to take down what was said? A. I don't believe he did.

Q. Well, there were other conversations had there that you thought were of importance, did you not? A. The statement was taken later I believe at the Precinct.

Q. I mean at that particular time while you were there at the Coney Island scene of the al- 1964
leged crime, did Mr. Heffernan tell the stenographer to take down what Mr. Malinsky said to him? A. I don't know what Mr. Heffernan instructed the stenographer to do.

Q. Was there a conversation that you related to what transpired in Coney Island; the conversation between you and the defendant or between you and somebody else? A. That is a conversation that was held in the car that Malinsky directed the chuaffeur in the car to proceed and he would tell him the route that he took. 1965

Q. I am talking about when you were in Coney Island? A. That is right.

Q. You got out of the car, didn't you? A. Yes, sir.

Q. Malinsky got out of the car? A. Yes, sir.

Q. And he showed you the Cosmo Restaurant? A. Yes, sir, that is right.

Q. When he showed you the Cosmo Restaurant, Mr. Heffernan was there? A. That is right.

Q. And how many other detectives were there? A. There were three or four others, I believe.

Q. Was he talking to you in the presence of all the three or four others, or was he talking to you privately? A. No, he was talking in general; everybody was there.

Q. Now I again ask you while he was talking to you in the presence of Mr. Heffernan, did he order the stenographer to take down what he said? A. I could not tell you what Mr. Heffernan ordered the stenographer. I don't know what Mr. Heffernan ordered the stenographer to do.

Q. You were about to say you were not there? A. I was not there where?

Q. You were just about to say, "I was not" what? A. No, no, I could not tell you what Mr. Heffernan done with the stenographer.

Q. You were standing right there near Mr. Heffernan? You were all grouped together? A. No, we were not grouped together.

Q. Well, did you see Mr. Heffernan or the stenographer make a note of everything that was said by Malinsky or anything that was said by Malinsky? A. I could not speak for Mr. Heffernan. I know I made my own.

Q. Did you make it in writing? A. No, I did not. I have a report made out.

Q. You mean, a report in writing? A. Yes, it is for the Police Department records.

Q. You mean a DD4 or 5 report? A. I guess so; that is what we make out.

Q. You guess so? A. The DD5.

Q. Did you incorporate all of this conversation in the DD5 report? A. It is a synopsis of a conversation. The stenographer took a state-

ment down and he put on there; Mr. Heffernan's man has got it. I don't know what he put there.

Q. You say the stenographer did take that down? A. I don't know what Mr. Heffernan ordered him to take down. I made my own report out.

Q. You are a detective? A. Yes, sir.

Q. Did he take anything down? A. I could not tell you what he took down.

Q. A minute ago you said he took something down? A. I didn't say it. I said I don't know 1970
what Mr. Heffernan ordered the stenographer to take down.

Q. May I ask that the previous question of the witness be read. Tell us whether or not the stenographer took down what he said. In other words, Mr. Celano, the stenographer took something down but you don't know just what it was? A. I was not directing the stenographer to do anything. That was Mr. Heffernan's stenographer.

Q. I didn't ask you that. Won't you please answer the question? A. I am answering it. 1971

Q. Did you incorporate everything of your conversation with Malinsky on October 25th at Coney Island in the DD5 report? A. As much as I have in there.

Q. Did you make a DD4? A. No, I did not.

Q. Did you make out a report known as M14? A. I don't know of any M14.

Q. Is there a report known as a 149, Form 149? A. If there is, we don't use it in my squad.

Q. Is that the only DD5 report that you made out? A. No, there are several of them, I guess.

Q. I am talking about you; did you make out

any other DD5 reports other than that? A. Yes, sir.

Q. Did you make out your report the same day or the next day? A. That I could not tell you. The report will speak for itself.

Q. Now you went to the garage the same day? A. What same day, do you mean?

Q. On October 25th, or was it the next day? A. That was on Monday. I went to the garage the next day.

Q. October 26th? A. It was the next day.

Q. That is, October 26th, you went to the garage? A. I believe it was.

Q. And while at the Hotel Bossert, these pictures here of this automobile, they were at the Hotel Bossert, weren't they? Well, I will show you one of those pictures known as People's Exhibit 11. Did you see that picture at the Hotel Bossert? A. I don't know; it might have been down there.

Q. You had pictures at the Hotel Bossert? A. We had plenty of pictures of the automobile on the night of the crime.

Q. And when Malinsky was there, pictures of the automobile were shown to him, weren't they? A. That I could not tell you.

Q. Didn't you show him some pictures of the automobile? A. I didn't show it to him.

Q. Do you know whether pictures were shown to him by others? A. I couldn't tell you that.

Q. Who went with you to the Meeker Avenue Garage? A. I think it was Detective McNally; John McNally.

Q. And do you remember when you or Detective McNally told him to try to open the door of

the car? A. I did not tell him to try it. I said, "Go over to the car and look it over."

Q. Do you remember when he took a handkerchief out of his pocket? A. I do.

Q. And do you remember when he tried the knob of the car and put his hand on the handle of the car with a handkerchief in his hand? A. That is right.

Q. And do you remember either you or McNally said to him, "what is the idea of using a handkerchief?" Do you remember that? A. 1976
Yes, I said that to him.

Q. And do you remember the defendant telling you, "What do you think I am going to do; put my hand on the knob of the door and leave my fingerprints there? I did not commit the crime and know nothing at all about the crime and that is why I am using a handkerchief." A. No, he said, "Us fellows in this kind of business got to be very careful not to touch anything and we always use a handkerchief to wipe it off"; that is what he said.

Q. He said he has got to be very careful; we 1977
have to be— A. "Us fellows in this kind of business got to be careful. We used to wipe it off with a handkerchief."

Q. He put his hand on the handle with a handkerchief before he touched it, when he tried the knob? A. That is right.

Q. And as a matter of fact, now, Celano, didn't he say to you or to McNally, that you heard him say, "The reason why I am using my handkerchief is because I do not want no prints on this handle. I did not commit the crime and

1978 I know nothing at all about the crime"? A. No, no, sir.

Q. Weren't there some words to that effect? A. Not to that effect at all.

Q. Was Heffernan over at the garage? A. No, sir.

Q. Was Mr. Heffernan over at the hotel on Monday when you left for the garage? A. I did not leave from the hotel.

Q. Where did you leave from? A. The 62nd
1979 Precinct.

Q. Was Mr. Heffernan at the 62nd Precinct when you left for the garage? A. I think he was.

Q. What time was it that you left for the garage? A. It might have been around 7 o'clock.

Q. In the evening? A. Yes, it was raining like the deuce.

Q. What time did you come back? A. It may have taken an hour or two; I am not sure. I know we returned to the 62nd Precinct.

Q. And before you left for the garage, the
1980 defendant was in the squad room or detectives' room of the 62nd Precinct, is that correct? A. I believe he was.

Q. And he was there being interrogated by Assistant District Attorney Heffernan, isn't that correct? A. Well, he was in there. Now I couldn't tell you whether he was being interrogated at the time or not. I know he was there.

Q. You were there? A. Yes.

Q. And you were in the room? A. Yes.

Q. And you could tell whether the man is asking another man questions? A. Yes, sir.

Q. You saw a stenographer there from the

District Attorney's office, didn't you? A. Yes, sir.

Q. And you saw Mr. Heffernan there, didn't you? A. Yes, sir.

Q. There was a table and a desk there, and chairs? A. Yes, sir.

Q. And isn't it a fact that the defendant was seated near this table where Assistant District Attorney Heffernan was and the stenographer was taking down the questions and answers that were propounded to the defendant Malinsky? A. 1982
I said I could not tell you whether he was questioning him at that time, but he did question him later.

Q. Didn't he question him right then and there while you were there and before you left for the Meeker Avenue garage? A. I couldn't tell you that. He was questioned all right but I could not tell you when.

Q. How long was Heffernan sitting in the room with the defendant before you left for the Meeker Avenue garage? A. I could not tell you that either.

Q. Would you say it was over an hour? A. I 1983
could not tell you.

Q. Can you give us the approximate time; your best guess at it? A. I could not tell you because there was a lot of other things to do there and I was doing them.

Q. Can't you give us any other guess at all? A. No, sir.

Q. You remember the conversations in detail, don't you? A. Yes, sir.

Q. But you cannot remember how long Heffer-

nan and the stenographer and Malinsky were in the room together? A. No, sir.

Q. You cannot give the slightest intimation to this jury? A. No, I don't know how long he was there.

Q. When you came back from the Meeker Avenue garage, you brought him into the same room that he was before, is that correct? A. It was one of the rooms there.

Q. Wasn't it the same room? A. Where the
1985 questioning was?

Q. Yes. A. I believe it was, yes, sir.

Q. And the Assistant District Attorney Heffernan was there? A. That is right.

Q. And the stenographer was there? A. That is right.

Q. And a number of detectives were there? A. That is right.

Q. And then the Assistant District Attorney Heffernan again asked you questions? A. That is right.

Q. You saw him then ask questions? A. That is right.

1986 Q. And the stenographer was there and he took down those questions and answers? A. Yes, sir.

Q. And how long was that questioning going on? A. I could not tell you that either.

Q. You were very much interested, were you not, as to what was going on? A. Yes, but I could not tell you how long it took or anything.

Q. Can't you give us an idea, an approximate idea, whether he examined Malinsky for one hour, two hours, or three hours? A. I could not tell you.

Q. Did you get back around nine o'clock from the Meeker Avenue garage. You said it was about two hours? A. I said approximately; it might have been; I don't know.

Q. Approximately about 9 o'clock? A. Yes, maybe.

Q. From 9 o'clock on until what time; would you give this Court and jury an approximate idea, that Mr. Heffernan was examining Malinsky? A. Mr. Solovei, I don't know. I had a lot of other things to do. I don't know how long 1988
Malinsky was in there.

Q. Would you say he was there until 12 o'clock at night? A. I could not tell you.

Q. What time did you leave the Bath Beach Station House that night or that morning? A. I don't know; it was quite late.

Q. Did you leave after 12 o'clock? A. Yes, it was quite late.

Q. Won't you please tell me; did you leave at 12 o'clock or after? A. I don't remember, Counsel.

Q. Was Mr. Heffernan there when you left? 1989
A. I don't remember that either.

Q. Did Mr. Heffernan leave ahead of you? A. I don't remember that either. I had a lot of other things to do besides watching Mr. Heffernan.

Q. I know you are a busy man. There is nothing that you want to withhold from this jury? A. Nothing at all.

Q. Won't you please tell us now whether or not Mr. Heffernan left before or after you did? A. I could not tell you; I don't remember.

Q. Was there any questioning going on after

one o'clock in the morning? A. It might have been; it might have been. I don't remember.

Q. Was there any questioning going on after two o'clock in the morning? A. I don't remember, Counselor.

Q. Whom did you go home with that night or that morning? A. That I don't remember.

Q. How did you go home? A. With my car.

Q. Your own car? A. Yes.

Q. Anybody ride in the car with you? A. I
991 don't remember.

Q. You don't remember whether any detective rode in the car with you? A. Well, I don't know. It might have been somebody else with me or not; I don't know.

Q. It could not be Malinsky? A. Unless he was out. I don't know. He could not have been out.

Q. Unless he was out? A. Yes.

Q. You mean to tell this Court and jury that you cannot with positiveness say that it was not Malinsky that was the person that went with
992 you? A. Counselor, I went home. I don't know who I went home with. There are several detectives there to go home with. I don't know.

Q. When you came back on the 25th of October, 1942, and you say Malinsky pointed out some of the places in Coney Island, Heffernan and the stenographer and all of you were together, weren't you, in the car? A. That is right.

Q. Did you go back to the Hotel Bossert? A. No, I did not.

Q. Did you take Malinsky back to the Hotel

Bossert? A. I don't think so. We were together.

Q. Where did you take him to on the 25th? A. I don't remember whether it was the Hotel Bossert or it was down there. I don't remember.

Q. Down where? A. Down the 62nd Precinct.

Q. You know, don't you, that he was not at the 62nd Precinct? A. It may have been the Hotel Bossert.

Q. I say, don't you know that he was not at the 62nd Precinct until the afternoon of the 1994
26th? Don't you know that? A. He might have been.

Q. He might have been? A. That is right; in the afternoon.

Q. So that when you left Coney Island in an automobile all of you together, you took him back to the Hotel Bossert, didn't you? A. I think we did, yes, that is right.

Q. You only think you did? A. That is right.

Q. And the stenographer and Heffernan and all of you went back to the Hotel Bossert, isn't that right? A. That is right.

Q. Now when you went back to the Hotel 1995
Bossert with Malinsky, did Mr. Heffernan sit down with the stenographer and interrogate Malinsky as to what transpired in Coney Island? A. I don't remember that because I went out right after that.

Q. What time did you get back from the Coney Island trip to the Hotel Bossert? A. I don't remember the time, Counselor.

Q. What time did you leave the Hotel Bossert; you? A. I left with them all.

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Q. I am talking about at night; what time did you leave after you brought him back? That I could not tell you.

Q. Whom did you leave with at the Hotel Bossert? A. I could not tell you that either.

Q. Did you have your car with you that day? A. I think I did.

Q. Did you drive away? A. Yes.

Q. Do you know whether you left at night or in the afternoon? A. I could not tell you, Coun-

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selor. We were so busy, I could not tell you what time we went away.

Q. All the other police officers were busy, too? A. Yes. I guess they were.

Q. How long have you been on the detective force? A. About 18 years.

Q. You are attached to the Homicide Squad? A. That is right.

Q. Is that right? A. That is right.

Q. You have testified in a great many cases, haven't you? A. I have.

Q. You have had a lot of experience in testify-

1998

ing, haven't you? A. Yes.

Q. And you have had a lot of experience in preparing cases for trial, isn't that so? A. That is right.

Q. And ordinarily you have a pretty good memory, haven't you? A. I think so.

Q. And ordinarily, you remember pretty good everything that transpires, don't you? A. That is right.

Q. Is this one of the times in your life that your memory has failed you? A. My memory has not failed me, Counselor.

Q. Is that the best answer you can give this

Court and jury, "I don't remember" to the questions I propounded to you?

Mr. McGough: That is objected to.

The Court: Objection overruled.

The Witness: Will you repeat your question, please?

Mr. Solovei: Will the stenographer please repeat it?

The Court: Repeat the question.

(The question was repeated by the stenographer.) 2000

The Witness: Well, I remember the important parts of the thing. I do not remember anything that is not of importance.

By Mr. Solovei:

Q. You remember the important parts of it, is that right? A. That is right.

Q. You remember those parts of the conversation or the happenings that you believe will assist the prosecution in making out a case against Malinsky, is that correct? A. No, sir. 2001

Q. When was the first DD5 report that you made out in this case? A. Around February 16th or 17th of 1941.

Q. That was when you first started investigating the case? A. That is right.

Q. Were you at the Hotel Bossert on October 23, 1942? A. I think I was.

Q. What time were you there? A. I don't remember the time but I am pretty sure I was there.

2002 Q. Were you there in the morning? A. I don't remember, Counselor.

Q. Well, could you tell us whether you were there before 12 o'clock in the morning of October 23, 1942, at the Hotel Bossert? A. I don't remember. I may have been there and I might have been out but I am pretty sure I was there.

Q. You are pretty sure you were there in the morning, is that right? A. I didn't say in the morning. It was some time during the day.

2003 Q. When you say "some time during the day", would it be fair to assume that you were there at least we say from 9 o'clock in the morning up to 4 o'clock in the afternoon? A. No, it might have been in the night. It may have been in the morning and until the night but I don't remember.

Q. I am asking you—

The Court: He said he does not remember. Proceed to something else.

2004 Q. Is there any reason for you not to remember? A. No, there is no reason, Counselor.

Q. Do you think you got there at night? A. I just told you I didn't remember. I might have been there early in the morning; I don't know.

Q. If you were there on October 23rd in the morning, could you tell this Court and jury just how Malinsky was dressed, if you were there?

The Court: He said he does not know if he was there in the morning.

Mr. Solovei: I am asking him, could he tell.

The Court: He said he does not know when he was there.

By Mr. Solovei:

Q. I will repeat the question. When you got there on October 23, 1942, can you tell us how Malinsky was dressed? A. Yes, at one time I could tell you, he had his clothes off.

Q. All his clothes off? A. No, he had his underwear on. 2006

Q. Did you talk to him that morning or that day, the 23rd? A. No, I did not have much to say to him.

Q. Did you see Assistant District Attorney Heffernan there? A. I don't believe I did; not when I was there.

Q. Who were the police officers that you saw there when you were there on the 23rd? A. Lieutenant McNally was there; Detective Lowe; and I don't know who else was there. I know myself.

Q. Yourself? A. Yes; at this particular moment. 2007

Q. Was Detective McNally there, the brother of the Lieutenant? A. I don't remember whether he was there or not, but I know Lieutenant McNally was there.

Q. Was Detective Bell there? A. He might have been; I don't remember.

Q. Captain McGowan there? A. No, sir.

Q. Acting-Captain Dowdell? A. No.

Q. Were you there at the Hotel Bossert on the 24th? A. I believe I was there, yes.

Q. And do you know what time you got there

on the 24th? A. That I could not tell you either.

Q. Was it in the morning or afternoon, do you think? A. Well, it might have been in the morning. We ran in and out of the place all day long.

Q. Did you see Assistant District Attorney Heffernan there on the 24th? A. I don't remember.

Q. Did you see him there on the 25th at the
2009 Hotel Bossert? A. He was thereabouts, but I don't remember what date he was there.

Q. Did you see him there every day that you were there? A. No, I did not say that.

Q. When you came back from the Meeker Avenue Garage to the Bath Beach Station, the 62nd Precinct, did you give in writing the conversation had between you and Malinsky to Assistant District Attorney Heffernan? A. I did not.

Q. Did you give him a report of the conversation? A. Not in writing. He took a statement from Malinsky.

2010 Q. Did you give it to him, I am asking? A. No, not in writing.

Q. Did you make out anything for the convenience of Mr. Heffernan so that he might examine Malinsky? A. No, no, he took a statement from Malinsky, I think.

Q. But you gave him nothing? A. I did not.

Q. You just came back with Malinsky? A. Yes.

Q. Brought him back into the 62nd Precinct? A. Yes, sir.

Q. Put him into the squad room where Assis-

tant District Attorney Heffernan and the stenographer was there? A. Yes.

Q. And you gave him no information about what transpired at the Meeker Avenue Garage? A. Not in writing.

Q. Not in writing? A. No, sir.

Q. Did you talk to him? A. No.

Q. Did you talk to him right in the presence of everybody? A. I talked to him and he took a statement from Malinsky.

Q. Did you talk to him in the presence of 2012
everybody? A. I don't remember whether I did or not. I cannot tell you who was there in the room at the time.

Q. As a matter of fact, you don't remember whether you talked to him, is that right? A. I believe I talked to him.

Q. You think you talked to him? A. I had to give him a report on what happened.

The Court: Anything further?

Mr. Solovei: I don't think so.

The Court: Step down. Is there any 2013
cross-examination by other counsel?

Mr. Geoghan: No questions on behalf of Indovino.

Mr. Carabba: None on behalf of Rudish.

2014 *Lt. James McNally—Recalled for People—Redirect*

LIEUTENANT JAMES McNALLY, recalled as witness for the People, testified as follows:

Redirect examination by Mr. McGough:

Q. You told us, Lieutenant, that you handled the investigations of this particular case? A. I did.

Q. Now at the time that Malinsky was at the Hotel Bossert, was he given anything to eat? A.
2015 Yes, sir.

Q. And was he given an opportunity to rest? A. Yes, sir.

Q. Can you tell us when it was that the defendant Rudish and also the defendant Indovino were brought in? A. I was not present when Rudish was brought in or Indovino. I know that we received a telephone call at the hotel at 5:40 that Indovino had been picked up.

Q. What date? A. The 24th.

Q. And how about Rudish? Can you tell us what date he was brought in? A. He was
2016 brought in on the 24th also but I was not there then either. That was a short time after Indovino.

Q. Did you have a talk with Rudish down at the hotel? A. I did.

Q. And did he answer your questions? A. Yes, sir.

Q. Did you question him about the night of February 15th, 1941? A. I did.

Q. What did he say? A. He said he knew nothing about it and he said he could prove that he was not connected with it. I said, "How could you prove that?" He said, "There was a man in Sing Sing who can prove that I had

nothing to do with it". I said, "Who is that man?" He said, "His name is David Yellin".

The Court: Is there any objection by counsel to this testimony?

Mr. Carabba: Conversation between this witness and the defendant Rudish?

The Court: Yes.

Mr. Carabba: I have no objection.

The Court: All right. 2018

Mr. Carabba: I cannot object to what Rudish said, but anything that Yellin said to him in the absence of the defendant Rudish, I am going to object to.

The Court: Yes, proceed, Mr. McGough.

By Mr. McGough:

Q. Rudish said, "There is a man in Sing Sing that can prove I was not there?" Is that right? A. That is correct.

Q. Was the word "alibi" mentioned? 2019

Mr. Carabba: I submit—

Mr. McGough: If there is any objection, I will withdraw it.

The Court: Proceed.

By Mr. McGough:

Q. Is that the first time Yellin's name was brought into the investigation? A. That was.

Q. What did you do, then, please? A. Then I notified—

2020 *Lt. James McNally—Recalled for People—Redirect*

Mr. Carabba: I object to what he did as not binding on the defendant Rudish.

The Court: Objection sustained.

By Mr. McGough:

Q. Did you have Yellin brought down and face Rudish after that conversation?

Mr. Carabba: I object to it as incompetent, irrelevant and immaterial, and not
2021 binding on Rudish, as to what he did.

Mr. McGough: This is very competent. I have a right to show—

The Court: Now, do not say what you have the right to show. Come up here at the bar and tell me not in the presence of the jury and I will determine whether you have the right to show it.

(Mr. Carabba and Mr. McGough appear before the Bench with the stenographer not in the presence of the jury.)

Mr. McGough: I propose to show that
2022 Rudish when he was questioned by the Lieutenant, when he was brought in, said that he had an alibi for that night, that he was with a fellow who is in Sing Sing and if you speak to that fellow, David Yellin, he will tell you he was out with him. I intend to show that this witness then ordered Yellin brought down and spoke to him within the hearing of Rudish and found that Rudish was lying.

The Court: Oh, no.

Mr. McGough: And that Yellin told the same story that he told here at the trial.

The Court: Oh, no.

 2023

Mr. McGough: This is being offered to show that up to that point nobody else mentioned—

The Court: I will not permit you to show that he had an independent private conversation with Yellin.

Mr. McGough: You misunderstand me, your Honor. I do not mean that I am going to have this witness show the conversation between Yellin and him, but I 2024 intend to have, with the Court's permission, to prove that when Rudish and Yellin faced each other, that Rudish then shut up; when he saw that Yellin did not back him up, he refused to do any talking at all.

The Court: I will not permit you to show that. You are skating on pretty thin ice, Mr. McGough.

Mr. McGough: I think I proved that Yellin was brought in through Rudish.

The Court: I will let you prove that, but I will exclude the rest.

Mr. McGough: I think I have a right 2025 to show that they brought Yellin down after that. That is the objection.

The Court: You mean you want to show that Yellin was in the same room with Rudish and he was brought down, and was in the same room with Rudish?

Mr. McGough: Yes.

The Court: That is all I will let you show. I will not let you go any further than that.

Mr. McGough: And also that was the first time—

2026 *Lt. James McNally—Recalled for People—Redirect*

The Court: Remember, when this man is under arrest, he is under no duty to speak, and if he is spoken to, he does not have to reply, and his failure to reply cannot be used against him.

Mr. McGough: And if he puts forth an alibi and that alibi is false—

The Court: You have already attempted to show during the direct examination
2027 of Yellin, who testified from the witness-stand as to that and you cannot go any further than that.

(The following was had in the presence of the jury.)

Mr. McGough: Is there any objection to the pending question?

Mr. Carabba: I object to it as incompetent, irrelevant and immaterial.

The Court: Objection as to the form of the question is sustained.

2028 By Mr. McGough:

Q. At the time Rudish told you that, did you check to find out if Yellin was in Sing Sing? A. Yes.

Mr. Carabba: Of course it is leading, but it is all right.

The Court: Go ahead.

By Mr. McGough:

Q. Was there a time when Yellin was brought from Sing Sing and was put in the same room with Rudish? A. On the 26th.

Lt. James McNally—Recalled for People—Recross 2029

Mr. Carabba: Of course that is leading.

The Court: Objection overruled.

Mr. Carabba: Exception.

The Witness: On the 26th of October.

By Mr. McGough:

Q. In other words, how much time elapsed between the time that Rudish said he had this man who could prove he was innocent— 2030

Mr. Carabba: I object to the form of the question as highly improper.

The Court: Objection overruled.

Mr. Carabba: Exception.

The Witness: He told me that on Saturday night. Of course we could not bring him down and get a Court order until Monday. He was brought down Monday.

By Mr. McGough: 2031

Q. And that was done? A. Saturday was the 24th and Monday was the 26th.

Q. And when was Rudish formally booked and charged with this crime? A. The 27th.

Mr. McGough: All right; that is all.

Cross-examination by Mr. Solovei:

Q. Lieutenant, were you in the automobile when you drove to Coney Island with the defendant Malinsky and Celano and other detectives? A. I was.

2032 *Lt. James McNally—Recalled for People—Recross*

Q. And what route did you take to go to Coney Island? A. Well, I know—I think we come out of the park to Ocean Parkway.

Q. Didn't you go through Hicks Street? A. I don't recall.

Q. What? A. I don't recall.

Q. Didn't you go through Hicks Street over the Highway? A. I don't recall.

Q. Along Bay Ridge? A. I know that we hit
2033 Ocean Parkway. Where we hit Ocean Parkway, I am not positive about, but some distance from Coney Island.

Q. I know, but isn't it a fact that you took the Hicks Street Highway and went over the highway and you went along Shore Road down through Bay Ridge, isn't that so? A. I don't know. I don't recall.

The Court: Proceed, please.

Mr. Solovei: That is all.

The Court: Step down.

2034 Mr. Meadow: May I ask a few questions?

The Court: Yes.

By Mr. Meadow:

Q. Was Rudish in your custody on the 25th of October? A. Yes, that was Sunday.

Q. He was not free to go home at that time, if he so desired, was he? A. No, we were conducting an investigation.

Mr. Meadow: That is all.

Mr. Geoghan: No questions on behalf of Indovino.

2035

SAMUEL KOVNER, residing at Attica Prison, New York, called as a witness in behalf of the People, being duly sworn by the Clerk, Mr. Walling, testified as follows:

Direct examination by Mr. McGough:

Q. How old are you, Kovner? A. 29.

Q. And at the present time you are confined to the State Prison at Attica, New York? A. That is right.

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Q. Under a sentence of this particular Court? A. That is right.

Q. Was it Judge Leibowitz that sentenced you? A. Yes.

Q. You were convicted of robbery first, armed, is that right? A. I was.

Q. And your sentence from Judge Leibowitz here, when you went away, was how many years in State Prison? A. 15 to 30 years.

Q. 15 to 30 years? A. Yes, sir.

Q. You are serving that sentence now? A. I am.

2037

Q. Is that your first conviction? A. Yes, sir.

Q. Did you know a man named Abraham Beitler in his lifetime? A. Yes, sir.

Q. How long did you know Beitler? A. I knew Beitler for about 12 years.

Q. Were you with Beitler at the time he died? A. Yes, sir.

Q. Where was that, please? A. The Hotel Abbey, 51st Street and Seventh Avenue.

Q. The Hotel Abbey in New York City? A. Yes, sir.

Q. Do you know what date he died? A. October 28, 1941.

Q. Will you look at this picture and tell me if that is a good likeness of Beitler at the time he died? A. Yes, sir, that is him.

Mr. McGough: May I offer it in evidence?

Mr. Solovei: I object to it on behalf of the defendant Malinsky, and upon the ground that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Solovei: Exception.

Mr. Carabba: I make the same objection, if your Honor pleases, on behalf of the defendant Rudish.

The Court: Objection overruled.

Mr. Carabba: Exception.

Mr. Geoghan: Same objection for Indovino.

The Court: Objection overruled.

Mr. Geoghan: Exception.

The Court: It will be received and marked.

(Photograph received and marked People's Exhibit 16.)

Mr. McGough: Can I show it to the jurors?

The Court: Yes. It is just offered as a likeness.

Q. How old was Beitler when he died? A. 24.

Mr. McGough: At this time, may it please the Court, I offer a certified copy

of a death certificate of one Abraham Beitler, showing his death at 7th Avenue and 51st Street on the 28th day of October 1941.

Mr. Geoghan: I object to it on the ground there is no proof before the Court that the Abraham Beitler whose name appears in this death certificate is the same Abraham Beitler that is mentioned in the testimony of this witness.

The Court: That is purely cumulative. 2042

Mr. McGough: The indictment sets forth the three defendants on trial acting in concert with one Abraham Beitler, deceased.

The Court: Well, is there any question that he is dead?

Mr. Carabba: I am going to object to it, if your Honor pleases, on behalf of the defendant Rudish. They have not shown that this Beitler referred to in this picture and in this certificate of death here, this affidavit from the Board of Health, 2043 is the same Beitler mentioned in the indictment.

The Court: I guess there is some merit to that point, Mr. District Attorney.

Mr. McGough: I would like to have your Honor allow me to connect it up.

The Court: Surely.

Mr. McGough: May I have it marked?

The Court: Mark it for identification.

(Photograph received and marked People's Exhibit F for Identification.)

2044

By Mr. McGough:

Q. I don't know whether I asked you how long did you know Beitler? A. I knew Beitler for 12 years.

Q. And did you know him under any nickname? A. Yes, by the name of Ebbie.

Q. And this photograph, which is marked People's Exhibit 16, is that the Abe Beitler that you said died at the Hotel Abbey last October? A.

2045 Yes, sir.

Q. Now Kovner, do you know Joseph Indovino, the defendant on the extreme right? A. Yes, sir.

Q. How long do you know Indovino? A. Oh, since 1940.

Q. Did you know him by any other name than Indovino? A. Tiger.

Q. And the defendant Sidney Rudish; do you know him? A. Yes, sir.

Q. How long do you know him? A. About 13 years.

2046 Q And the defendant Malinsky? Do you know him? A. Yes, sir.

Q. How long a period of time? A. Eight years.

Q. Now do you know the date that Patrolman Leon Fox was killed in Coney Island? A. Yes, sir.

Q. What date was it? A. February 15, 1941.

Q. Now some time around that time, did you see Joe the Tiger and anybody else that is here on trial? A. Yes, I seen Tiger and Malinsky.

Q. And where did you see them, Kovner? A. I seen them on Attorney and Broome, about five days before the 15th.

Mr. Solovei: I object to it and move to strike the answer out.

Mr. Geoghan: I make the objection on the ground it is incompetent, immaterial and irrelevant, and not within the issues here.

The Court: We cannot tell this far. At this time I will overrule your objection.

Mr. Solovei: I except.

Mr. Geoghan: I except.

2048

By Mr. McGough:

Q. Now who was with Kovner at the time you saw Indovino and Malinsky at that place? A. I did not hear the question.

Q. Can you hear me at all? A. Now I can hear you.

Q. Who was with you when you saw Malinsky and Indovino at that time and place? A. Ebbie was with me.

Q. Ebbie who? A. Ebbie Beitler.

Q. Now was there a conversation amongst the four of you? A. Yes, sir. 2049

Q. What, if anything, did you hear Tiger Indovino say?

Mr. Solovei: I object to it on behalf of the defendant Malinsky.

Mr. Geoghan: I object to it.

By the Court:

Q. The conversation was had in the presence of the four? A. Yes, sir.

2050 *Samuel Kovner—For People—Direct*

Q. Name the four. A. Ebbie, myself, Tiger and Malinsky.

Q. Louder. A. Ebbie, myself, Tiger and Malinsky.

The Court: Objection overruled.

Mr. Solovei: Exception.

Mr. Geoghan: Exception.

Mr. Morritt: The defendant Rudish objects.

2051 The Court: Objection sustained as to Rudish.

Q. Now we are ready for the conversation. Tell us what was said, if anything. A. Tiger came down to speak to Ebbie; Tiger and Malinsky. Tiger said he had a piece of work and if Ebbie wanted to go on it; if Ebbie and I wanted to go on it, so Ebbie asked what the piece of work was. Tiger said it was a payroll in Coney Island. He said, "A cop goes with the payroll but he will give up if you put a pistol to his back."

2052

Q. Who said that? A. Tiger.

Q. Did you hear that? A. Yes, sir.

Q. Whom did he say it to? A. He said it to me and Ebbie.

Q. What else was said, and tell us who said it. A. After I pulled Ebbie on the side, I spoke to Ebbie privately.

Q. Before that, was any particular location or place mentioned?

Mr. Solovei: I move to strike out the answer on behalf of the defendant Malin-

sky on the ground that it is incompetent, irrelevant and immaterial, not binding on the defendant Malinsky, and highly prejudicial to the interests of Malinsky; this being some time prior to February 15, 1941.

The Court: He said it was five days before.

Mr. Solovei: That is right.

The Court: Objection overruled.

Mr. Solovei: Exception. 2054

Mr. Geoghan: Same objection as to Indovino.

The Court: Objection overruled as to Indovino. This testimony is received only as against Malinsky and as against Indovino, and it must be considered as against Rudish.

Mr. Solovei: I take exception to your Honor's statement.

By Mr. McGough:

Q. I asked you, was any place mentioned? A. 2055
Yes, sir; Coney Island.

Q. Who mentioned that? A. The Tiger.

Q. By the Tiger, you mean this defendant Indovino on trial? A. Yes, sir.

Q. Tell us what was said after that, please, and tell us who said it. A. I called Ebbie on the side. I said, "Excuse me a few minutes, I want to talk to Ebbie."

Mr. Geoghan: I object to this, that it is not in the presence of Indovino.

The Court: Objection sustained.

Mr. McGough: I submit this is in line with what developed with respect to Indovino; Judge; if it is in furtherance of any alleged conspiracy, I submit it is competent, and I offer it for that purpose.

The Court: Well, this is in a little different category from the testimony of Yellin, because if Yellin's testimony is to be believed, and that of course is always for the jury, Indovino and the other man, Beitler, were present when Beitler asked Yellin to carry the message to Slip Spielfogel. Now this is a little different proposition.

Mr. McGough: All right.

The Court: From that situation. You appreciate that, Mr. McGough?

Mr. McGough: Yes, I think your Honor is correct, after that explanation.

The Court: Proceed.

By Mr. McGough:

Q. Now Kovner, you told us that at that moment Ebbie took you aside, is that right? A. Yes, sir.

Q. Now without telling us what he said to you, did you and he talk for a second or two? A. Yes, sir.

Q. After that was over, what did the two of you do? A. Well, we went back to continue—Ebbie wanted to continue the conversation.

Q. With who? A. With Tiger and Malinsky.

2059

Q. And did you hear Ebbie say anything to Tiger and Malinsky? A. Yes.

Q. Tell us that, please. A. Ebbie said, "Are you going along?"

By the Court:

Q. To whom? A. To Tiger.

Mr. Solovei: I object to it and move to strike it out on behalf of Malinsky.

2060

The Court: Objection overruled.

Mr. Solovei: Exception.

By Mr. McGough:

Q. What did Beitler first say after he went back and joined the two that you have mentioned, Malinsky and Indovino? A. He said, "Sammy does not want to go."

Q. What? A. He said, "Sammy does not want to go."

Q. What else? A. He said, "Do you want to go along," to Tiger. He said, "Are you going, you, Malinsky and I, the three of us"—

2061

The Court: Who is Sammy?

The Witness: I was.

By Mr. McGough:

Q. Did he say anything else besides, "Sammy don't want to go"? A. He says that, "Sammy does not want to have anything to do with anything that has got a cop on it."

Q. He said that in your presence to Indovino and Malinsky? A. Yes, sir.

Q. Now what did Tiger say after that last conversation with Ebbie, "Did you fellows want to go"?

Mr. Solovei: I object to it on behalf of Malinsky.

The Court: Objection overruled.

Mr. Solovei: Exception.

2063 The Witness: Tiger said that he can't go; he is known and he can't go.

By Mr. McGough:

Q. He is known? A. Yes, he told Ebbie that he can't go; he is known down there.

Q. Down where? A. Down in Coney Island.

Q. Did Ebbie say anything else to that? A. Well, Ebbie made an appointment with them—Ebbie made an appointment with them at that time, and at that time he said, "I will look to see if I can get a third man to take along."

2064 Q. That was the first conversation with Indovino, is that right? A. Yes.

Q. Were you present at a second time when Beitler and Indovino had a talk? A. Yes, sir.

Q. And tell us about what date that was. A. That was about February 21st or 22nd.

Q. That would be after the Fox shooting? A. Yes, sir.

Q. And where did you see Indovino then? A. On Attorney and Broome.

Q. The same streets? A. Yes, sir.

Q. What did Indovino say at that time?

Mr. Solovei: I object to it on behalf of Malinsky.

The Court: Objection sustained.

Mr. Geoghan: Same objection.

The Court: Overruled as to Indovino.

Mr. Geoghan: Exception.

The Court: Objection sustained as to Rudish. This testimony is received only as against Indovino in this instance. Proceed.

By Mr. McGough: 2066

Q. Did you mean that that was about the 22nd or 21st? A. The 21st or 22nd.

Q. Will you give us the conversation then? A. He told Ebbie that he needs more money or he needs money, and spoke about different things. He did not speak about—strictly money or everything was referring to money.

Q. That conversation you say was with Indovino? A. Right.

Q. Who did he ask for money? A. Ebbie.

Q. Did he ask for any certain amount? A. 2067
Well, no, he just said he needed money.

Q. Now did you see Indovino after that? A. Ebbie made an appointment with him at that time for two days later.

Q. And where was the appointment for? A. Houston and Allen, in a bar and grill.

Q. What time of the day or night? A. About nine o'clock at night.

Q. And did Indovino keep that appointment, if you know? A. Yes, sir.

Q. Were you there? A. Yes, sir.

2068

Q. Who else was there? A. Just Indovino and Ebbie and myself.

Q. Now was there a talk with reference to what happened in Coney Island at that time? A. Yes, sir.

Q. Who started the talk first? A. Indovino did, the Tiger.

Q. What did he say? A. The Tiger did.

Q. What did he say?

2069

Mr. Solovei: I object to it.

The Court: Objection sustained as to Malinsky.

Mr. Carabba: I object.

The Court: Objection sustained as to Rudish.

Mr. Geoghan: Same as to Indovino.

The Court: Objection overruled as to Indovino. The testimony is received only as to Indovino.

Mr. Geoghan: Exception.

The Court: Proceed.

2070

The Witness: He said, "You are too fast." He says, "You got too hot. You did not have to shoot him. All you had to do was to put the gun up against his back." He said, "What did you shoot him for?" He was referring to the cop in Coney Island.

By Mr. McGough:

Q. Who said that? A. The Tiger.

Q. Did Beitler say anything then to Tiger Indovino? A. Beitler said, "I am on the lam.

I am hot and I won't stand for a cop identifying me."

Mr. Geoghan: I object to it as not binding upon the defendant Indovino, what Beitler said about being on the lam.

The Court: Objection overruled.

Mr. Geoghan: Exception.

By Mr. McGough:

2072

Q. Now did you see Indovino at any time after that, which was in the bar and grill? A. After the bar and grill?

Q. Yes. A. I seen him on Broome and Attorney.

Q. What was located at Broome and Attorney Streets? A. Well, it was just a corner. There was an empty store on the corner.

Q. Is that the place where you frequently hung out? A. Ebbie and I used to be there quite often, practically every day.

Q. Now you say you saw the Tiger there at another time, is that right? A. Yes, sir. 2073

Q. Can you fix the time and date, approximately? A. Between 8:30 and 9.

Q. What date? How much later after the bar and grill incident? A. Well, it was about February 27th or 28th. It was about three or four days after the bar and grill; about a week; between three and four days and a week.

Q. Now what did the Tiger say at that time and to whom? A. He told Ebbie if Ebbie made a score. He said, "I heard you made a score. I need money."

2074 Q. Did Beitler give him any money? A. No, sir.

Q. Now with reference to Morris Malinsky, did you see him in March of 1941? A. Yes, sir.

Q. Where did you see him? A. Well, he come over to my car.

Q. Your car? A. Yes, sir; at that time I bought a car, in March.

Q. Where was it parked? A. It was parked on Broome Street between Attorney and Ridge.

2075 Q. Did he say anything at that time with reference to February 15, 1941? A. Yes, sir.

Q. What did he say to you? A. Ebbie was there at that time.

Q. Beitler and you and Malinsky? A. That is right.

Q. Anybody else? A. No, just Beitler, I and Malinsky.

Q. And what did Malinsky say at that time? A. Well, Malinsky said something about the cop to Ebbie. He said to Ebbie, "I am on the lam." He said, "Somebody made me for it. Drive me over to Williamsburg right away."

2076 Q. Did he say anything else but "Somebody made me for it"? A. No, sir, "Somebody made me for it"; that is what he said.

Q. Did he say anything about the Fox case?

Mr. Solovei: I object to it.

Mr. Geoghan: I object to it as leading.

Mr. Solovei: I object to this line of testimony.

The Court: Objection overruled.

Mr. Solovei: The questions are highly improper.

The Court: Objection overruled.
Mr. Solovei: Exception.
Mr. Geoghan: Exception.

By the Court:

Q. What do you mean? Do you know the meaning of the phrase "made me for it"? A. Yes.

Q. What phrase is that, and where is that used? A. Somebody identifies me for something. 2078

Q. Where is that used commonly? A. It is used amongst hoodlums.

Q. Amongst hoodlums? A. Yes, sir.

The Court: Proceed.

By Mr. McGough:

Q. Did you give us all the conversation with Malinsky in the car in March 1941? A. Well, Malinsky at that time did not say very much outside of, "I am on the lam; drive me over to Williamsburg," but I see Malinsky five or six times after that and he was always talking about it. Everytime I seen him, he spoke about it. 2079

Q. Always talking about what, Kovner? A. About the killing in Coney Island.

Q. What is that? A. About the killing; about the cop.

Q. That was Malinsky? A. Yes.

Mr. McGough: That is all.
Mr. Geoghan: May we have a few

2080 minutes' recess before I start to cross-examine the witness?

The Court: Yes, Mr. Geoghan.

Mr. Geoghan: Thank you.

(The jury was duly admonished by the Court; and after a short recess the trial was resumed.)

SAMUEL KOVNER, resumed.

2081

Cross-examination by Mr. Geoghan:

Q. Now, Kovner, you say you were convicted in this Court of the crime of robbery in the first degree, armed? That is correct? A. That is right.

Q. And that his Honor was presiding here, Judge Leibowitz? A. Yes.

Q. And he sentenced you for a term of from 15 to 30 years? A. Correct.

Q. Were you ever convicted of any other

2082 crime? A. No, sir.

Q. By the way, you were taken into custody in connection with this very case, were you not? A. No, sir.

Q. Weren't you ever brought in by the detectives who were investigating the Fox murder case? A. I don't believe so.

Q. Don't you know? A. I don't think so.

Q. You mean you don't know? A. I was never told I was brought in for that case.

Q. Were you ever brought over to the Bossert Hotel? A. Yes, sir.

Q. In connection with the Fox murder case? A. No, sir.

Q. When was it? A. Today.

Q. At any time before today? A. No, sir, this week.

Q. Any time since October of 1942? A. Since October 1942?

Q. I will withdraw that. When were you sentenced? A. I was sentenced in March of 1942.

Q. So that in October 1942 you were in Sing Sing Prison? A. No, sir, I was in Attica 2084
Prison.

Q. Pardon me, I should say Attica Prison. That is where you are serving your sentence? A. Yes.

Q. But at any time since February 15, 1941, were you ever questioned by any detectives in connection with the Fox murder case? A. No, sir.

Q. Now you say you know Joseph Indovino? A. Yes, sir.

Q. When did you first meet him? A. Sometime in 1940.

Q. What month? A. About August; in the 2085
summer.

Q. What year? A. 1940.

Q. 1940? A. 1940.

Q. And where was it that you first met him? A. I met him in a bar and grill.

Q. Where is the bar and grill? A. On Houston and Allen.

Q. In Manhattan? A. Yes, sir.

Q. Who introduced you to him? A. A fellow by the name of Foxy.

Q. Fox? A. Foxy.

Q. How do you spell it? A. F-o-x-y.

Q. That is his nickname? A. Yes.

Q. You don't know his right name? A. No, sir.

Q. The only name you knew him by was Foxy? A. Yes, sir, that is right.

Q. And after August 1940, when was the first time you met him? A. The first time I met him was in February.

Q. Of what year? A. 1941.

2087 Q. And about what time of the month? A. About the 9th or 10th of the month. I believe it was the 10th.

Q. Do you know what day of the week it was? A. No, sir.

Q. What time of the day or night was it that you saw him on February 10, 1941? A. What time of the night?

Q. What time of the day or night? A. Well, it was about 8:30.

Q. In the evening? A. In the evening.

Q. And where? A. On Attorney and Broome, on the corner.

2088 Q. Out on the street; that is on the sidewalk? A. That is right.

Q. You did not have any particular appointment with him at that time, did you? A. No, sir.

Q. Just happened to pass by and saw him there? A. I used to be there. I used to be there.

Q. You mean that was a place where you used to meet some of your friends? A. I used to be there with Beitler.

Q. You knew Beitler quite well, did you? A. Yes, sir.

Q. Now at that time you say that there was a conversation between you and Beitler and Indovino? A. Yes, sir.

Q. Will you give us in detail just what the conversation was? Repeat it. A. What the conversation was?

Q. Yes. Indovino said he had a piece of work in Coney Island, a payroll for $2,500.

Q. $2,500? A. Yes, sir. 2090

Q. Yes? A. And Beitler—he wanted Beitler and me to go along, and I spoke it over with Beitler and I refused it because he said there was a cop that goes along with it, and I wouldn't have anything to do with a cop that is in anything.

Q. If there was anybody other than a cop, you might have gone along on it? A. Possibly.

Q. You had gone out on other jobs with Beitler prior to that time? A. Yes, sir.

Q. Other robberies? A. Yes, sir.

Q. How many of them? A. I don't know. 2091

Q. A great number? A. A few.

Q. More than three or four? A. About three.

Q. Could it be five or even six? A. No, about three.

Q. And that was with Beitler? A. Yes, sir.

Q. Indovino was never with you, was he? A. No, sir.

Q. And you carried a gun, did you? A. Once in a while.

Q. You never went without a gun when you went out on robberies? A. Oh, I went on robberies plenty of times without a gun.

Q. But whoever was with you had a gun? A. We went plenty of times without a gun.

Q. No one on the stickup parties had a gun? A. At times we had guns, and at times just put our hands in our pockets.

Q. That was not very often, Kovner? A. Well, as much as with a gun.

Q. Just about fifty-fifty, is that it? A. Possibly.

Q. In the case in which you were sentenced
2093 here by Judge Leibowitz, you had a gun, though, didn't you? A. No, sir. You mean I had a gun?

Q. Yes. A. I didn't have a gun.

Q. There was a gun used? A. There was guns used.

Q. You were under the protection of that gun while you committed the robbery? A. Yes, sir.

Q. You were sentenced, armed, weren't you? A. I was sentenced on robbery first degree. I don't know what it means armed.

Q. Robbery first degree, armed. A. Robbery
2094 first degree, that is all I know, robbery in the first degree. I don't know anything else.

By the Court:

Q. Did you stickup a bookmaker here on Snyder Avenue? Wasn't that it? A. Church Avenue and East 31st Street.

Q. A bookmaker? A. Yes.

The Court: Proceed.

By Mr. Geoghan:

Q. Did Beitler or Indovino on the occasion of

your conversation with them on February 10th, ask you to bring somebody else in? A. Asked me?

Q. That would be willing to come along? A. Did they ask me?

Q. Yes. A. Beitler asked me to go with them.

Q. And you refused, didn't you? A. Yes, sir.

Q. Did they ask you to get somebody else? A. No, Beitler said he will get somebody else.

Q. Now did you see Indovino at any time between February 10th and February 15th? A. 2096 No, sir.

Q. Did you hear from him in any way? A. No, sir.

Q. Did you see Beitler between the 10th of February and the 15th of February? A. Yes, sir.

Q. Where did you see him? A. Well, I seen him every day, from the 10th until the 15th, until he left me.

Q. Beitler then was a regular pal of yours? A. Yes, sir.

Q. From the month of August 1940, when 2097 you say you first met Indovino, as I understand it, you never saw him until February 10, 1941? Am I correct in that? A. Well, I saw him once or twice pass by but I never spoke to him. I saw him a few times.

Q. Down in that same neighborhood of Attorney and Broome? A. No, around Houston and Allen on First Avenue. I never spoke to him at that time. I mean, I passed him and said, "Hello", and kept walking.

Q. No conversation? A. No.

Q. And do you recall what time of the day or

2098 night you saw him on those occasions? A. No, sir.

Q. You don't know whether it was the daytime or the nighttime? A. Well, if I saw anybody it was the nighttime; it was not the daytime.

Q. Never in the daytime? A. Very seldom I was around in the daytime.

Q. Now the second time, as I understand it, you saw Indovino and Beitler on February 21st or February 22nd, I understand that was your
2099 testimony? A. About a week after the 15th.

Q. Had you heard of the shooting in the meantime? A. Yes, sir.

Q. You knew there was the death of a patrolman by the name of Fox? A. Yes, sir.

Q. In connection with the Coney Island robbery? A. Yes, sir.

Q. And you knew exactly what that was all about before it happened, didn't you? A. No, sir.

Q. Beitler and Indovino rather had told you about it on February 10th, as you stated? A. Yes.

2100 Q. So you knew about it? A. Knew about what?

Q. You knew they were planning a robbery down in Coney Island? A. That is right.

Q. How did you first hear about the robbery? A. I heard about the robbery or the shooting?

Q. Of the shooting. A. I heard about it from Beitler.

Q. Pardon me? A. I heard about it from Beitler.

Q. When did he tell you? A. Told me the same night.

Q. The same night? A. Call it the morning. I call it the night but it is really morning.

Q. That is, that night? A. Three o'clock in the morning.

Q. The early hours of Sunday morning? A. Yes, sir.

Q. You met him at that time? A. He met me.

Q. Where? A. In the Embassy Club in Flatbush.

Q. The Citadel Club? A. The Embassy Club on Flatbush Avenue. 2102

Q. And it was at that time that he told you that he participated in it? A. Yes, he told me he shot a cop.

Q. So that within a few hours after it happened, you knew all about the murder of Patrolman Fox? A. Well, I knew that he shot a cop.

Q. What? A. I knew he shot a cop.

Q. He told you? A. That is right.

Q. Now on February 22nd or February 21st, you say you met Beitler and Indovino again at Attorney and Broome Street? A. I didn't meet Beitler and Indovino. I was with Beitler at all times. Anybody that met me met me with Beitler. 2103

Q. You were always together? A. I was with Beitler at that time, yes, sir.

Q. And what about Indovino? A. He came down and met Beitler there, and I was there.

Q. And what time was that? A. That was about nine o'clock.

Q. In the evening? A. Yes, sir.

Q. Was there anybody with Indovino at the time he came to the place where you and Beitler were? A. Nobody.

Q. What? A. Nobody.

2104

Q. Now did you have any conversation with Indovino at that time? A. Did I have any? No, sir.

Q. Yes? A. No, sir.

Q. Did Indovino and Beitler have a conversation? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. And you say at that time they discussed this robbery? A. They discussed money.

Q. Discussed money? A. Talking only about

2105 money.

Q. Who was talking about money? A. Indovino.

Q. Any specific amount asked for? A. No, sir, he just says he needed money.

Q. And Beitler refused? A. Yes, sir.

Q. Did not give him any money? A. No, sir.

Q. You say that he told Ebbie that he needed money? A. Yes, sir.

Q. Now the third time you met him, as I understand it, was about two days after the second meeting, is that correct? A. Yes, sir.

2106 Q. Where did you see him at that time? A. Houston and Allen.

Q. That would be about February 24th; the 23rd or 24th? A. About that time.

Q. What time of the day or night was that? A. Nine o'clock.

Q. And again there was some discussion about money? A. Well, there was discussion about money and also discussion about the shooting.

Q. Between Indovino and Beitler? A. Yes, sir.

Q. You heard it all? A. In my presence.

Q. Indovino did not seem to be reluctant at all

to discuss this murder case in your presence, did he? A. Well, no one—I mean, I was always with Beitler.

Q. You were no great friend of Indovino's, were you? A. Well, casual.

Q. Not a confidential friend? A. No, I was Beitler's confidential friend.

Q. But he freely discussed this murder and robbery in your presence with Beitler? A. I knew all about it.

Q. I didn't ask you that. Will you answer that 2108
question? A. What?

Q. I say, did he freely discuss all about the murder case in your presence? A. That is right.

Q. Now the fourth time you met him, I understood you told the District Attorney, was about February 27th or 28th? Am I correct in that? A. That is right.

Q. Where did you see him, Indovino, on that occasion? A. At Attorney and Broome.

Q. The same place? A. Attorney and Broome.

Q. That is the same corner where you had met him before? A. This is the corner where I was. 2109

Q. Was Beitler with you again? A. Yes, Beitler had to be with me.

Q. Were you and Beitler together all day and all night? A. Well—

Q. Every day? A. We separated for a few hours and he would go away for something or other.

Q. But if he was in the City, he would be with you all the time? A. He would be with me if he was in the City.

Q. Didn't you work? A. Not at that time.

Q How long were you out of work during 1941?

2110 A. Well, I was out of work practically the whole year in 1941.

Q. Did no work at all? A. No.

Q. Except stickups, is that it? That was your job, sticking up people?

By the Court:

Q. You were a crook, weren't you? A. Yes.

Q. You were just a plain ordinary dyed-in-
2111 the-wool thief and crook, is that it? A. Yes.

Q. Just living by thieving and holdup, isn't that it? A. Yes, sir.

The Court: Anything more, Mr. Geoghan?

Mr. Geoghan: That is plenty.

By the Court:

Q. Beitler was your pal? A. Yes, sir.

Q. He was also a stickup man and a crook? A. Yes, sir.

2112 Q. Isn't that it? A. Yes, sir.

The Court: Proceed.

By Mr. Geoghan:

Q. And you also knew that Beitler was about as big a crook as you were, isn't that right? A. Yes, sir.

Q. Were you his bodyguard? A. No, sir.

Q. Didn't you go around protecting him at different times? A. No, sir.

Q. You did not? A. No, sir.

Q. Now on February 27 or 28th, what was your conversation then or what conversation did you overhear between Indovino and Beitler about the Fox case? A. Well, Tiger told Beitler he heard he made a score.

Q. Who said that? A. Tiger told Beitler he heard he made a score.

Q. Meaning what? A. A score is making money. He made money. He stuck somebody up and made some money. It is slang.

Q. In other words, they were successful in 2114
the robbery that they set out to do? A. No, this was something else. This was another robbery.

Q. Another robbery that Beitler was in? A. Yes.

Q. Not Indovino? A. No, just Beitler.

Q. So that that conversation was not about the Fox case? A. No, sir.

Q. Was there anything said about the Fox case in your presence that night between Indovino and Beitler? A. That night on Attorney and Broome? No, sir. 2115

Q. Nothing at all? A. No, sir.

Q. Now who was the first person that you ever spoke to about what you knew in connection with the Fox murder case? A. I did not speak to no one. The first person, you mean?

Q. Yes. A. I spoke to Mr. McGough.

Q. He is the first one? A. Yes.

Q. Did anyone at all tell you about it up in prison? A Someone might have.

Q. Someone might have? A. Might have mentioned it or mentioned something pertaining to it, or, "Did you hear Fox got killed," or some-

thing like that. I don't know if anybody spoke and sat down with me like a brother and told me what happened and I told him. Someone could have said, "Fox got killed"—or "Do you know who killed Fox". They might have said it.

Q. By the way, when you were brought up to prison from Brooklyn, were you brought to Sing Sing first? A. Yes, sir.

Q. How long were you in Sing Sing? A. Two
2117 and a half months.

Q. And from there, you were transferred to Attica? A. Yes, sir.

Q. While you were in Sing Sing Prison, do you recall any person, any of the convicts there telling you about the Fox murder case? A. I don't remember.

Q. You don't remember? A. No.

Q. Do you know anybody up there—I withdraw that. Do you know anybody in Sing Sing Prison by the name of Kurt Lawrence? A. Kurt who?

Q. Kurt Lawrence. A. Kurt Lorensen.
2118

Q. Do you know him? A. I met him. I was in Raymond Street with him.

Q. He was a friend of yours before you went up? A. He was no friend of mine. He was in Raymond Street with me. He is only a kid.

By the Court:

Q. He is only what? A. A young kid.

By Mr. Geoghan:

Q. How do you spell his name? Do you know? A. Lorensen. It is a long name.

Q. You first met him in Raymond Street Jail and also saw him up in Sing Sing? A. Yes, sir.

Q. From the time that you heard about this case, and knew about the Fox murder case, did you ever speak to any official, any police officer or any representative of the District Attorney's office in Kings County, until you were brought down here a day or two ago? A. No, sir.

Q. What? A. No, sir.

Q. Never did? A. No, sir. 2120

Q. When were you brought down from Attica? A. I came in Monday night, 12 midnight.

Q. And where did you go? Where were you brought? A. I was brought to the Tombs Prison in New York.

Q. On Tuesday, were you brought here to Brooklyn? A. I was brought to the District Attorney's office.

Q. Where were you taken in Brooklyn? A. Yes; to the District Attorney's office.

Q. Here in the Municipal Building? A. I guess it is the Municipal Building. 2121

Q. That was the first place you were brought? A. Yes, sir.

Q. Were you brought to the Bossert Hotel at any time on Tuesday? A. No.

Q. Now on Tuesday, when you were at the District Attorney's office, whom did you speak to? A. The first one?

Q. Yes. A. My father.

Q. Who? A. My father.

Q. I mean, what representative of the District Attorney's office? A. Mr. McGough.

2122 Q. That is Mr. McGough who is conducting this trial? A. Yes, sir.

Q. And he asked about what you knew in connection with the Fox case? A. Yes.

Q. And that is the first time you ever mentioned it to any public official? A. What I knew? Yes, sir.

Q. What? A. Yes, sir.

Q. The first time? A. Yes.

Q. Or to any member of the Police Force?
2123 You never mentioned it to them, did you? A. No, sir.

Q. Any promises of any kind made to you? A. No, sir.

Q. Any promises of help for any help you might give the People of the State of New York in connection with this case? A. No, sir.

Q. In connection with your testimony in the case? A. No, sir.

Q. You do not expect any, do you? A. No, sir.

Q. You would not lie about this case merely to help somebody or to help the People in its
2124 case? A. No, sir.

Q. You would not commit perjury? A. Why should I?

Q. Do you know what perjury is? A. Sure, I know.

Q. Would you commit perjury to help yourself? A. No, sir.

Q. You consider that is too low a crime to commit? A. That is right.

Q. Even though it would mean helping you to lessen the term of years— A. I don't have to—

Q. Wait a minute—that is now hanging over

2125

your head in prison. You would not do it even for that? A. No, sir.

Q. You would commit robberies with a gun but not perjury, is that right? A. That is right.

By the Court:

Q. What do you mean, you don't have to? A. If you let me explain, I will.

Q. You may explain. A. I do not have to because if I did not stop Beitler, he would have killed certain people. Beitler wanted to kill certain people and I stopped him; the people over there.

2126

By Mr. Geoghan:

Q. You had to stop him? A. He came to me—

Mr. McGough: Wait a minute. If the door is opened, I will march right in.

The Court: Do you want to pursue this further?

Mr. Geoghan: No; he is volunteering something.

2127

The Court: Proceed.

By Mr. Geoghan:

Q. I want a specific answer to my question. You consider perjury so low that you would not commit it even if it would help yourself? A. Yes, sir.

Q. You would commit robberies with a gun and stick up people? A. I will rob people like

2128 bookmakers and Shylocks and all illegitimate people.

Mr. Geoghan: Judge, I would like an answer "Yes" or "No".

Mr. McGough: It has already been asked and answered before.

Mr. Geoghan: It has not. Please wait until I finish.

The Witness: Yes.

2129 By Mr. McGough:

Q. You would commit a crime and have committed the crime of robbery with a gun, but you would stop at the crime of perjury even though it would help yourself? A. Not in this case.

Q. Please wait until I finish.

The Court: Let him finish.

The Witness: Yes.

The Court: Wait until Mr. Geoghan has finished his question before you answer. Just wait until the lawyer has completed his question and then you will have an opportunity to answer. Proceed, Mr. Geoghan.

2130 Mr. Geoghan: May I have the stenographer repeat the question.

The Court: Yes, repeat the question.

(The question was repeated by the stenographer as follows:

"Q. You would commit a crime and have committed the crime of robbery with a gun, but

you would stop at the crime of perjury even though it would help yourself?")

By Mr. Geoghan:

Q. Yes or No? A. I don't understand the question. Read it again. There is too many words there.

The Court: Read it again.

The Witness: You get me all mixed up. 2132

(The last question was repeated by the stenographer.)

By Mr. Geoghan:

Q. Yes or No? A. I don't understand the question.

Q. Let me put it in this way. A. Speak in plain English.

Q. You have committed the crime of robbery, haven't you? A. Yes, sir.

Q. You stand convicted of that? A. Yes, sir. 2133

Q. But you would not commit the crime of perjury, that is to say, you would not lie on that stand under oath, even though by that lie you would help yourself in the predicament in which you are in now? A. Yes.

Mr. Geoghan: That is all.

Redirect examination by Mr. McGough:

Q. Did you say that you will commit the crime of robbery or that you would commit it—

in other words— A. I have committed the crime—

The Court: I think Mr. Solovei should have the opportunity to cross-examine the witness before any other examination by you.

Mr. McGough: All right.

The Court: I just want to ask a question in line with what Mr. Geoghan asked you. I want to be clear on what you claim. The credibility is of course for the jury.

2135

Mr. Solovei: I first move to strike out all this man's testimony.

The Court: Wait; you are interrupting the Court.

Mr. Solovei: I am sorry. I thought you were through, sir.

By the Court:

Q. You are testifying here against two men? A. Yes, sir.

2136

Q. That is, Malinsky and Indovino? A. That is right.

Q. These men are on trial for their lives? You understand that? A. Yes, sir.

Q. Now do you understand the full import of your testimony, the importance of your testimony here? A. Yes, sir.

Q. You understand that, don't you? A. Yes, sir, I do.

Q. First I want to know if you ever had any trouble with Malinsky? A. No, sir. No, Judge.

Q. Did you ever have any trouble with Indovino? A. No, Judge.

Q. Have you ever had any disputes with them? A. No.

Q. Now I take it what Mr. Geoghan asked and meant, and I want to be crystal clear on it, is would you commit perjury; would you lie— A. No, Judge.

Q. —knowing that your lies may send a man away, may convict a man? A. No.

Q. If you knew it could help you? A. No, I 2138
would not.

Q. How long have you known, would you say, Malinsky? A. Oh, about eight years.

The Court: All right, go ahead. I take it that is what you had in mind, Mr. Geoghan.

Mr. Geoghan: Yes, Judge.

Mr. Solovei: I move to strike out all this man's testimony, if your Honor pleases, upon the ground that it is incompetent and immaterial and irrelevant 2139
and not binding upon the defendant Malinsky.

The Court: He has said nothing about Malinsky, has he?

Mr. McGough: My recollection is that he said that the first time, which was about the 10th of February, Beitler and he were together when Malinsky came over at Broome and Attorney Street and Tiger did the talking.

The Court: In the presence of Malinsky?

2140

Mr. McGough: That is correct.

The Court: Is that correct, Mr. Solovei?

Mr. Solovei: I think that is correct.

The Court: I deny your motion as to that feature of the testimony.

Mr. Solovei: I except.

The Court: But as to his conversation with Indovino, not in the presence of Malinsky, in which Malinsky did not partici-

2141

pate, I sustain your objection, and I have already instructed the jury that that evidence is received only as against Indovino.

Mr. Solovei: In view of this man's testimony, if your Honor pleases, I now move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied.

Mr. Solovei: Exception.

Cross-examination by Mr. Solovei:

2142

Q. Kovner, in October 1941, did you live at the Hotel Abbey in New York? A. Yes, sir.

Q. Did Beitler live at the Hotel Abbey in New York? A. Yes, sir.

Q. Did you occupy the same rooms together? A. The same one room.

Q. What? A. One room.

Q. On October 28, 1941, while you lived at the Hotel Abbey, do you remember police officers coming to that hotel? A. Yes, sir.

Q. Do you remember them coming to the room where you lived? A. Yes, they came.

Q. Did you live on the 21st floor? A. No.

Q. The 24th floor? A. No, sir.

Q. What floor did you live on? A. The 9th floor.

Q. The 9th floor? A. Yes, sir.

Q. Is that the same floor that Beitler lived on with you? A. Yes, sir.

Q. Now do you remember the first one to enter the building was Beitler?

The Court: Now—

The Witness: You ask me what happened, and I will tell you what happened. 2144
If you ask me what happened, I will tell you what happened.

The Court: Go ahead.

By Mr. Solovei:

Q. That was the time when you and Beitler and a man by the name of Sam Kolinsky were there, is that right? A. Yes.

Q. Is it Kolinsky? A. Koblonsky.

Q. And that was the time when Beitler and the police shot it out, is that right? A. Well, something to that effect. 2145

Q. Yes? A. And Beitler committed suicide.

Q. The police tried to get in there to lock up Beitler, you and Koblonsky, and there was a lot of shooting going on? A. No such thing. Ask me what happened and I will tell you.

The Court: Wait until Mr. Solovei puts the question.

Q. There was some shooting there—

2146

The Court: Wait a minute, please. I know you do not do it intentionally, Mr. Solovei. It is all done unintentionally, but please do not shout at him.

Mr. Solovei: All right, Judge.

The Court: It is not done with any intention at all but it tends to disrupt the proceedings somehow.

Mr. Solovei: All right, Judge.

The Court: Mr. Geoghan examined him
2147 in a quiet fashion and there was no trouble. I think you will have just as much ease with him if you speak quietly to him. There is no necessity to get excited.

By Mr. Solovei:

Q. That was the night that Beitler shot it out with some cops at the hotel, is that right? A. He shot a man that night and he committed suicide.

2148 Q. He shot at the cops, too, didn't he? A. He fired at a cop, too.

Q. Now can you give this Court and jury a minute detail, if you can, how that crime was committed in Coney Island on February 15, 1941?

Mr. McGough: I object.

The Court: Objection sustained.

Mr. Solovei: I except.

The Court: Proceed.

By Mr. Solovei:

Q. You and Koblonsky were held on this charge? A. No.

Q. The Fox murder? A. Koblonsky was in prison at the time this happened.

Q. Koblonsky was? A. Yes.

Q. When was he arrested? A. He came out in July 1941. He was arrested in 1938. He went back for violation in November 1941. He was only out three months, July to November. 2150

Q. Were you picked up with somebody in reference to this case? A. No, sir.

Q. At no time questioned about the Fox murder case yourself? A. No, sir.

Q. Are you friendly to Spielfogel, Slip? A. I met him in Sing Sing.

Q. Prior to that, were you very friendly with him? A. I never knew him outside. I never knew him before I see him in Sing Sing.

Q. Did you ever see him around the East Side? A. No.

Q. How about Yellin? Did you ever know him? A. Didn't know him until I see him in Sing Sing. 2151

Q. And this man Kurt Lawrence, did you know him before you met him in jail? A. He ain't a friend of mine. He is only a young kid. He was only in Raymond Street with me.

Q. The name is Kurt Lorensen, is that right? A. Yes. He was on the same gallery with me in Raymond Street. I only spoke to him once or twice in Sing Sing.

Q. And of course while at Sing Sing, you

never had anything to do with Yellin or Slip, did you? A. I ate with Slip.

Q. You never had anything to do with him other than eating with him? A. That is right.

Q. And you never discussed your affairs with him? A. I did not discuss mine, no.

Q. And he never discussed his? A. He might have said something about a few affairs that I don't remember what.

Q. Now you said something about Malinsky
2153 that you met him sometime in March in 1941, is that correct? A. That is right.

Q. And he said something about being on the lam, using your language, is that right? A. That is right.

Q. Didn't you know that Malinsky worked for a trucking concern in New York City? A. No, I did not.

Q. Did you see Malinsky in the City of New York often after March? A. Yes, I saw him 'way until June.

Q. And he was walking around the streets of
2154 the City of New York? A. Whenever I saw him he was walking.

Mr. Solovei: I think that is all.

The Court: Are there any other questions by counsel for Rudish?

Mr. Carabba: May I ask your Honor to instruct the jury that whatever testimony this witness gave is not binding on the defendant Rudish?

The Court: There is nothing that this witness has testified to that in anywise implicates Rudish. That is clear, isn't

it. There can be no question about that. He has not mentioned Rudish's name at all. Is that instruction satisfactory?

Mr. Carabba: Yes, sir.

Mr. McGough: That is all. Step down. The People now rest, and I would like the Court's permission, if I may get it, to call Miss Esther Levine, of 321 Chester Street, Brooklyn, New York, just as soon as we can bring her to Court.

The Court: Is that the sister of this 2156
man Levine?

Mr. McGough: Yes. The young lady is at business, and the police say that she will not be home until perhaps six o'clock. I think I can guarantee that she will be here in the morning. I have spoken to her already, that is my office has, and I would like to rest at this time with the provision that I might reopen the People's case solely to put her on and then rest again.

The Court: You just want to account 2157
for the fact that you did not bring Levine here?

Mr. McGough: That is right.

The Court: And where Levine is? Is that it?

Mr. McGough: That is all.

The Court: At the present time?

Mr. McGough: That is the only reason.

The Court: Do counsel object to the District Attorney's proposal?

Mr. Carabba: No.

Mr. Geoghan: No. I understand he just wants to call one other witness.

Motion to Dismiss Indictment Against Defendant Malinsky

The Court: He wants to call the sister to account for the absence of a man by the name of Levine.

Mr. Geoghan: I certainly have no objection to that.

The Court: Any objection, Mr. Solovei?

Mr. Solovei: No objection.

The Court: And you rest your case with that exception?

Mr. McGough: The People now rest with that exception.

The Court: I will hear the motions at this time.

Mr. Carabba: May I make the motions tomorrow morning?

The Court: Make your motions now.

Mr. Carabba: I do not think the motions should be made in the presence of the jury, your Honor.

The Court: It does not make any difference. Do you want the jury excluded?

Mr. Carabba: The only thing is this, that I would like to have an opportunity to review the testimony that is being furnished to us daily, and then make my motions.

The Court: Make your motions now.

Mr. Solovei: I move to dismiss the indictment and for the discharge of the defendant Malinsky as a matter of law, upon the ground that the People have failed to make out a case against the defendant Malinsky beyond a reasonable doubt in accordance with the statute made and provided for in such cases.

Motion to Dismiss Indictment Against Defendant Indovino

2161

The Court: Motion denied.

Mr. Solovei: Exception.

Mr. Geoghan: I understand there was some reservation made by your Honor that you would accept certain testimony subject to its being connected up. I think that happened in the very beginning. I do not recall just what it was.

The Court: Yes; that is the testimony of Yellin.

2162

Mr. Morritt: That was the testimony of these so-called persons who preceded Yellin. These were people that were at the scene at that time.

The Court: You mean the people who testified about the shooting out in Coney Island?

Mr. Morritt: All the testimony.

The Court: That will stand. That all will stand. That merely describes the crime. It does not connect any of the defendants with the commission of the crime. That testimony will certainly stand.

2163

Mr. Geoghan: I move to dismiss the indictment as to Indovino and discharge the defendant, on the ground that the only testimony here to connect him with the commission of this alleged crime is the testimony of Yellin, who by his testimony in this case, is an accomplice, and whose testimony must therefore be corroborated in order to connect Indovino with the commission of the crime, and the only other testimony is the testimony of this convict, who has just left the witness-stand, and

2164 *Motion to Dismiss Indictment Against Defendant Rudish*

that his testimony is not believable, as a matter of law; so as a matter of law I move and say that there is enough reasonable doubt in your Honor's mind to dismiss at this time the indictment against Indovino.

The Court: Your motion is denied, Mr. Geoghan.

Mr. Geoghan: And I move to dismiss it on all the other grounds set forth in the

2165 Code of Criminal Procedure.

The Court: Motion is denied.

Mr. Geoghan: Exception.

Mr. Carabba: I respectfully move, if your Honor pleases, on behalf of the defendant Rudish, to dismiss the indictment as a matter of law on the grounds that the prosecution has failed to prove the case stated by them in their opening; and has failed to prove the allegations contained in the indictment.

The Court: Your motion is denied.

166 Mr. Carabba: I respectfully except.

Mr. Meadow: I would like to make a motion on behalf of the defendant Rudish on a further ground.

The Court: Only one counsel will make motions. Call it to the attention of Mr. Carabba.

Mr. Meadow: I am willing to give it.

The Court: All right, I will hear you, too.

Mr. Meadow: There was only the testimony of Yellin and Spielfogel as to the defendant Rudish. There was no other testimony whatsoever.

2167

The Court: The only testimony you are speaking now of is the prima facie case?

Mr. Meadow: Yes.

The Court: The only testimony in this case that concerns Rudish is the testimony of Yellin and Spielfogel.

Mr. Meadow: Now, if your Honor pleases, Spielfogel—I am sorry.

The Court: That is all that I recall, and some testimony by a police officer, who 2168
spoke to Rudish in the Hotel Bossert, where Rudish is alleged to have said, "Yellin can prove that I am innocent". Is that correct?

Mr. Meadow: Yes.

The Court: Is there anything else in the record?

Mr. McGough: I think your Honor is right. I think that is substantially correct; Yellin and Spielfogel, and that testimony with reference—to that of Lieutenant McNally at the Bossert Hotel.

Mr. Meadow: Spielfogel said that he 2169
was not called before the Grand Jury—

The Court: Let us not go into the details.

Mr. Meadow: I am talking about the law. I am discussing the law, your Honor. Section 399, and People against Nitzberg—if your Honor wishes, I will discuss it at the Bench.

The Court: What is your point about People against Nitzberg? How is that material? Come up here.

(Mr. Carabba and Mr. Meadow confer with the Court at the Bench.)

The Court: I will deny your motion for the present.

Mr. Meadow: Exception.

Mr. Solovei: Just one more application on behalf of the defendant Malinsky. Under Section 1041 of the Code of Criminal Procedure, I further move to dismiss the indictment as charged on the ground as a matter of law that the People have totally failed to prove by independent proof that the person mentioned and described in the indictment as the person that shot and killed Leon Fox was the man who is mentioned therein as Abraham Beitler. The section your Honor is undoubtedly familiar with.

The Court: There are a lot of sections that I do not now a thing about. I am one Judge that does not say I am familiar with everything. Let me see it.

Mr. Solovei: Section 1041, I am referring to.

The Court: That is the *corpus delicti* section?

Mr. Solovei: Yes, that is right.

The Court (reading): "No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of the killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt." Motion denied.

Mr. Solovei: Exception.

The Court: Gentlemen of the jury; I

denied the motions of each of the lawyers to dismiss the indictment as against their respective clients. What I am about to say now I shall repeat in my charge when the case is submitted to you but I think it is appropriate at this time because it is immediately after the ruling, to call your attention to the fact that I have not decided the guilt or innocence of these defendants by denying counsel's motion. I have not ruled that they are innocent and 2174
I have not ruled that they are guilty; that you are going to decide. I have merely ruled that there is enough in the case thus far to make out what is known in law as a *prima facie* case as against each defendant; therefore I denied counsel's motions. These rulings upon matters of law shall have no part in the determination of the jury as to the guilt or innocence of these defendants or either of them or any of them. It is no indication on the part of the Court that the Court believes them 2175
guilty or that the Court believes them innocent. The Court has no belief in that matter, and with which the jury can have no concern. Now I think I have covered everything.

Mr. Meadow: Except as to my motion.

The Court: I have denied your motion at the present time with an exception to the defendant Rudish. Is there anything else you care to have me say to this jury to make it clear? I think I have made it clear. I want to be absolutely more than fair to each of these defendants.

Mr. Carabba: I feel that my motion to dismiss was incomplete and if I had an opportunity to make it tomorrow—

The Court: If I deem it important to hear you any further, I will do so in the morning. At the present time your motion is denied.

Mr. Carabba: Would your Honor consider in the morning giving me an opportunity to amend the motion that I have
2177 made here. I wanted an opportunity to read the evidence.

The Court: You shall have the opportunity if it becomes necessary.

Mr. Carabba: Thank you.

The Court: Gentlemen of the jury, we are about to take a recess until tomorrow morning at 9:30. I admonish you again not to discuss the case among yourselves or with any other person or permit any person to speak to you about this case or discuss it in your presence. You must
2178 keep your minds open. Do not form or express any opinion or conclusion as to the guilt or innocence of these defendants, or either of them or any of them until the case has been finally submitted to you by the Court after a charge on the law. Refrain from reading anything in the public press about this case. You may retire and return here tomorrow morning at 9:30 o'clock.

(The jury retires from the courtroom.)

The Court: The defendants are remanded.

(Recess until 9:30 a. m., June 19, 1943.)

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Motions to Strike Out 2179

AFTER RECESS. TRIAL RESUMED, and ROLL CALLED.

Brooklyn, N. Y., June 19, 1943.
9:30 a.m.

Mr. Multer: The defendant Indovino moves to strike out all the testimony which was received subject to connection and subject to motion to strike out; all of Spielfogel's testimony as against him; 2180
all of Yellin's testimony; all of Eisler's testimony; all of Kovner's testimony as to matters subsequent to February 15th, 1941, as well as all of the rest of the testimony.

The Court: As well as the testimony concerning the transactions before that date?

Mr. Multer: Yes. Now then, the defendant Indovino also moves to strike out all testimony and proof which is at variance with the theory of this case as presented to the Grand Jury; all of the testimony and proof which is in variance 2181
with the indictment and all of the testimony and proof which is in variance with the District Attorney's opening. And after your Honor disposes of those motions, I want to add some grounds to the motions to dismiss that were made yesterday.

The Court: Well, gentlemen of the jury, I am afraid I shall have to ask you to step out. There will be some argu-

ments on legal questions, with which you have no concern. Do not discuss the case. Keep your minds open. I will send for you when we are finished.

(The jury leaves the room.)

The Court: Let us first go to the consideration of Item No. 1. As I understand it you are making a general motion to strike out all testimony which was received by the Court subject to connection?

Mr. Multer: Yes, sir.

The Court: Will you point out the testimony that you have in mind, so that we will know what we are talking about? You have available the daily copy of the testimony that was taken thus far, and we will go over it, page by page, and if you will call my attention to the pages, I will rule on your motion. Mr. Multer, are you referring to the witnesses who testified concerning the episode down in Coney Island? Are those the witnesses you have in mind?

Mr. Multer: Yes; I have those witnesses in mind.

The Court: No other witnesses. When you speak of them, first point out the testimony that was taken subject to connection.

Mr. Multer: I have those in mind as well as Yellin and Spielfogel.

The Court: I will deal with Yellin and Spielfogel later.

Mr. Multer: First, your Honor, I ad-

dress myself to the testimony of Dolinsky, Kallman, Glodowsky, Gimbel, Hollingsworth—the testimony of those witnesses whom I have just mentioned, plus that of Eisler, Shamin—

The Court: Suppose we take these witnesses, one by one, and then we will know what we are talking about. Mention them, one by one, and I will rule.

Mr. Multer: Dolinsky.

The Court: Motion denied. 2186

Mr. Multer: Kallman.

The Court: Motion denied.

Mr. Multer: Rabbitt.

The Court: Motion denied.

Mr. Multer: Glodowsky.

The Court: Motion denied.

Mr. Multer: Gimbel.

The Court: Motion denied.

Mr. Multer: Hollingsworth.

The Court: Denied.

Mr. Multer: Eisler.

The Court: Eisler is Red Tiplet. 2187

Mr. Multer: Red Tiplet.

The Court: Denied.

Mr. Multer: Shamin, that is the boy.

The Court: That testimony was before the occurrence. It refers to some matter before the occurrence.

Mr. Multer: Yes.

Mr. Carabba: That only refers to one defendant, Malinsky.

The Court: His testimony referred to the absence of Malinsky from his place of employment. Sustained.

Mr. Multer: Goonan, Virginia—

The Court: Jean Goonan, sustained, motion granted.

Mr. Multer: Pietro De Pisa.

The Court: Motion granted.

Mr. Multer: Detective Celano.

The Court: Motion granted.

Mr. Multer: Samuel Kovner.

The Court: Your motion with reference to Kovner is in two parts: First, as to the transaction occurring on or before February 15th, and, second, those occurring thereafter.

Mr. Multer: Yes, sir.

The Court: Your motion with reference to Kovner is in two parts: First, as evidence prior to the alleged shooting of the policeman, insofar as it mentions Indovino, is denied. Now, then, with reference to the other testimony, which is that referring to the evidence subsequent to February 15th, I believe that testimony refers to the meeting between Indovino and Beitler, wherein Indovino demanded some money.

Mr. McGough: That portion of the testimony, "Why did you have to shoot him? Why did you put a gun in the back?" I submit that part is competent. "Why didn't you do like I said?"

The Court: Is there anything there to the effect, "Why didn't you do like I said?"

Mr. McGough: If your Honor will bear with me I will look at the record once

more. (Examining record.) I am referring to page 605, your Honor, that last portion that I just mentioned is not here, but I will read. He said, "You are too fast. He says, 'You got too hot. You did not have to shoot him. All you had to do was to put the gun against his back.' He said, 'What did you shoot him for?' He was referring to the cop in Coney Island. Q. Who said that? A. The Tiger. Then Beitler said, 'I am on the lam; I am hot; 2192
and I won't stand for a cop identifying me.'"

The Court: Motion denied with reference to that item of testimony.

Mr. Multer: Of course, in each instance, may the record show—

The Court: Is there any testimony that you want to make motions in reference to? I want you to call it to my attention specifically so that I may rule on it. If you don't, I will deem that you have waived your rights to strike out. Is 2193
that clear?

Mr. Multer: Clear.

The Court: Let the record be absolutely clear on the point that unless you call to my attention the testimony that you have in mind you will be deemed to have waived your motion with reference to the testimony which you omit.

Mr. Multer: But in view of the fact that we are doing it piecemeal, I will take one exception at the conclusion, instead of after each ruling.

2194

The Court: I want to rule on every point of testimony that you have in mind. I want to give you a clear cut ruling so that your record will be protected; but I haven't the time to go through a thousand pages of testimony.

Mr. Multer: Quite right.

The Court: Have you gone through it?

Mr. Multer: I have read it except today's—I mean the testimony with regard

2195 to the morning of yesterday's session.

The Court: You have made notations?

Mr. Multer: Of each of these motions, as we went along? No, I did not, Judge.

The Court: I would like to have you take all the time you need. I am prepared to give you all the time you need. I want you to point out each item of testimony to which you have reference.

Mr. Multer: You mean by more than the name of the witness?

The Court: No; the name of the wit-

2196 ness and the portion of the testimony to which you have reference.

Mr. Multer: May the record show up to this point that I take an exception to each denial by your Honor of these parts of the motion to strike out.

The Court: Have you finished with Kovner?

Mr. Multer: I have finished with Kovner, yes. We have taken his testimony as a whole, and we have taken it specifically in parts as before and after February 15th.

The Court: Insofar as he mentions Indovino, that is, the episodes wherein Indovino is involved, as in the presence of Indovino, and that Indovino speaks in his presence, both before and after the transaction; your motion is denied.

Mr. Multer: Yes; and I except.

The Court: Now, the witness, Louis Sonenblick.

Mr. Multer: All he testified to, if I recall correctly, is he lived out in Brownsville. 2198

The Court: Louis Sonenblick is a man who lived out in East New York, Spielfogel's uncle. That relates to a transaction prior to the occurrence and accounts for Rudish's presence out in East New York or in the vicinity of that neighborhood.

Mr. Multer: I am making a motion on behalf of Indovino.

The Court: Now, I will hear you. On what grounds? What is the basis of your objection? 2199

Mr. Multer: There is no connection in this trial, on the proof in this record, between Rudish and Indovino.

The Court: Now, let us see. If the testimony of Yellin is to be believed, a conspiracy was hatched, was formed, several days before February 15th, between Beitler and Indovino. Rudish enters the picture through the testimony of Spielfogel, who relates that he gave Rudish a telephone number or an address, rather,

2200

of his uncle, who lived out in East New York, so that a parole—a man who was on parole at the time, could, through the agency of his uncle, be given a job—whether it was an actual job or a pseudo-job, to cover the parole, is beside the point. Of course, that testimony, if it were not connected with Rudish's alleged theft of the car, it would be of no importance, it would mean nothing in the

2201

case. But I take it that that testimony is offered by the District Attorney to account for Rudish's presence within one mile of the place where Mr. Hollingsworth's car was stolen, namely, Pine Street and Fulton Street, in Cypress Hills or East New York. In other words, it is a link in the chain to make the evidence understandable. Now certainly, Rudish's theft of the car would be binding on Indovino even though Rudish came into the conspiracy after the plot

2202

was hatched.

Mr. Multer: Assuming all the time the conspiracy.

The Court: I am not passing on the credibility of the witnesses; I am merely taking the testimony.

Mr. Multer: You, as matter of law must first say there was a conspiracy.

The Court: Now, let me see. Of course, Rudish's statement was made after the occurrence, to Spielfogel.

Mr. Multer: You cannot relate back to establish the conspiracy. This declara-

tion of the co-conspirator after the conspiracy cannot relate back to bring Indovino in.

The Court: How about Rudish, though?

Mr. Multer: It might be an admission against interest by Rudish. I doubt even that under all the circumstances, but it cannot bring Indovino into it.

The Court: What do you say about that, Mr. District Attorney? Have you 2204
followed?

Mr. McGough: Yes; I have been listening carefully.

The Court: What do you say about it?

Mr. McGough: Which particular point, Judge? On Indovino?

The Court: Here is Mr. Multer's point of law: Spielfogel comes along and testifies here that he had a talk with Rudish and Rudish said to him, "I want you to get a job for a thief who is out on parole—that is an alleged job—with your 2205
uncle. I want you to O.K. me with your uncle, because there is a parolee that has to be on the books of some concern."

Mr. McGough: Something to that effect.

The Court: So Spielfogel is alleged to have said, "You go out and see my uncle."

Mr. McGough: Gave him the address.

The Court: Gave him the address. "Tell my uncle I said it was O.K." Period! The story ends there until after

2206

the crime is committed, and then Spielfogel picks it up again and says, "After the crime was committed I had a talk with Rudish, and Rudish said to me he went out in the general direction of where this uncle's place was but I had left the address in my old working clothes, and I tried to reach you on the telephone two or three times and could not find you at your hang-out" or words to that effect,

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"and I did not know where the uncle's place, but being in the neighborhood and having to make a dead line at 9 o'clock in Manhattan where I was to meet the other gentry that were going on this job with me, I had to grab" what he called "the first load", I think it was. I am trying to tap my memory as to the language. And he said, "I grabbed an automobile there which I drove to New York and picked up Beitler and Malinsky, and then we drove out to Coney Island." Now,

2208

that is the conversation with Spielfogel which occurred after the commission of the crime. Counsel says that portion of the testimony has no binding force on Indovino.

Mr. McGough: I think we can answer that in just a minute if you let me refer to the record.

The Court: Although he concedes that it would have binding force on Rudish. No question about it.

Mr. Multer: I don't want to make that concession because I am not concerned

2209

with that defendant. I should not be called upon to make a concession about it.

The Court: I understand. Even if you made a concession, it would amount to nothing as far as Mr. Carabba's client is concerned.

Mr. McGough: Your Honor I refer to a portion of the testimony, page 218, to be exact, where on Saturday afternoon—that, of course, preceded the occurrence—Spielfogel in testifying here said, that Rudish and he had a conversation. He said he has got to meet them at nine o'clock that night. He said, I am going out in Brooklyn by your uncle's place, and I want to get some job and all I want is your O.K. when I go there. Now, if that conversation started before the occurrence, I submit that everything that relates to the conversation—which I think we will concede was in furtherance of the conspiracy—

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The Court: Up to the commission of the crime?

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Mr. McGough: And that conversation that Rudish had with Spielfogel as to what he did subsequent to the crime explains that conversation that took place on Saturday afternoon.

The Court: It may be as against Rudish, but not as against Indovino. My point is that the statement of a co-conspirator in furtherance of the conspiracy, up to and prior to the commission of the offense, is competent against

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all of the conspirators. There is no question about that. But statements made by a conspirator after the commission of the offense, relating what occurred, and not being in furtherance of the conspiracy, are certainly not competent against any one except the conspirator making the statement. The cases have gone to the point where evidence has been admitted, as binding on all the conspirators, of con-

2213

duct after the conspiracy. I believe in the Becker case the division of the spoils took place in a room. I may be wrong about its being the Becker case, because it may have been another case the name of which escapes me.

Mr. McGough: I think it is the Ryan case.

The Court: The division took place after the crime was committed, and not all of the conspirators were present. The Court in that case held that although they

2214

were not all present, still it related to the final termination of the conspiracy—in other words, the wind-up of the job, which included the division of the spoils. In that case the Court of Appeals held that it was binding on the other conspirators even though not present. But here is testimony to the effect that one of these alleged gangsters met Spielfogel and told him how it happened, related the story as to how it happened. That is not binding, by the widest stretch of the imagination, on any of these alleged criminals

other than the one who made the statement.

Mr. McGough: I agree with you on that, Judge.

The Court: I am going to allow the testimony to stand with reference to Sonenblick.

Mr. Multer: Exception.

The Court: I am going to strike out all testimony concerning statements alleged to have been made by Rudish to 2216
Spielfogel after the 15th of February, as not binding on Indovino.

Mr. Multer: You are letting Sonenblick's testimony also stand?

The Court: Sonenblick's testimony also stands.

Mr. Multer: Exception.

The Court: It is merely a little cog which is a part of the whole wheel of this conspiracy, although standing by itself it is meaningless.

Mr. Multer: The testimony of Patrol- 2217
man Corboy and of Detective Basch.

The Court: Corboy? Your motion with reference to Corboy's testimony is denied.

Mr. Multer: Exception. With reference to Detective Edward Basch?

The Court: Denied.

Mr. Multer: Exception. Now, we come to the testimony of Yellin.

The Court: The testimony with reference to Yellin, that refers to the meeting of Indovino and Beitler. How much of

the testimony do you want stricken out, or do you want it all stricken out?

Mr. Multer: I want, certainly, his testimony about his going to Spielfogel.

The Court: And communicating with Spielfogel.

Mr. Multer: Yes.

The Court: What he said to Spielfogel?

Mr. Multer: Yes.

The Court: Denied.

Mr. Multer: Exception. And his testimony as to the conversation with Ebbie Beitler.

The Court: At what time? There was only one episode referred to? Isn't that correct?

Mr. Multer: I think you are right.

The Court: Just that one meeting where he and Indovino asked him to go to see Spielfogel and to lay a proposition before Spielfogel. That is denied.

Mr. Multer: Exception. Of course, the testimony with reference to Indovino where he says he had a conversation with Indovino or was present at a conversation between Indovino and Beitler—

The Court: You move to strike that out?

Mr. Multer: Yes.

The Court: On what ground?

Mr. Multer: On his own testimony he is an accomplice.

The Court: That does not make the testimony invalid, that he is an accomplice.

2221

Mr. Multer: If it is uncorroborated.

The Court: That is another point. Because he is an accomplice does not make his statement incompetent or invalid. You are on another proposition now. Your motion is denied. Are you finished with the testimony of Yellin?

Mr. Multer: Yes; I believe I am.

The Court: Sure about that now? I want to have the record absolutely clear.

2222

Mr. Multer: I think my motion with reference to Yellin has always been piecemeal. As directed against all of Yellin's testimony, I ask that all of his testimony be stricken out, as well as those parts which I have specifically referred to during the course of the motion.

The Court: The only other testimony given by Yellin concerns what Spielfogel said; is that correct? The answer of Spielfogel?

Mr. Multer: I think that is right.

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The Court: Now, I would be glad to hear you on that, and I will be glad to hear you, Mr. District Attorney.

Mr. Multer: I think it is almost self-evident that what Spielfogel said to Yellin outside the presence of these defendants is not binding on these defendants, any of them.

The Court: Now, isn't it, to use the vernacular of the baseball field—carrying the ball along?

Mr. Geoghan: Yes; on the part of Yellin.

The Court: Isn't that part of the play that was designed by the two coaches, Indovino and Beitler? Isn't this the quarterback running with the ball as taught by the two master coaches? Hasn't the quarterback got the right to show just what effect the play had?

Mr. Geoghan: That is all right for the quarterback, but unless Spielfogel is a member of the team, then anything he said was certainly not competent, and you are not making him a member of the team.

The Court: I understand. We are now talking about Yellin's testimony. We will come to Spielfogel's testimony later.

Mr. Geoghan: I don't refer to Yellin's testimony.

The Court: Mr. Multer is referring to Yellin's testimony.

Mr. Multer: I think you have already denied my motion with respect to what Yellin said he did and what he said.

The Court: You are now talking about what Spielfogel said to Yellin, as related by Yellin on the witness stand. He is not talking now, Mr. Geoghan, about Spielfogel's testimony.

Mr. Geoghan: That Spielfogel is not a member of the team.

The Court: We will come to Spielfogel later.

Mr. Geoghan: I referred only to Spielfogel's testimony, not what Yellin said.

2227

The Court: We are talking about Yellin's testimony.

Mr. Moulter: Now, we are directing the motion specifically to what Yellin said Spielfogel told him.

The Court: That is right. Why isn't that competent?

Mr. Moulter: Outside of the presence of the defendants.

The Court: Does not make any difference. He is their agent; he is their emissary. He was given a task to do. It is true that it was, as it turned out later, a minor task, but nevertheless a task. He carried the ball, as they say on the football field, with full knowledge of its criminal import. I think I will deny your motion with reference to that.

2228

Mr. Multer: Exception.

The Court: I think that completes Yellin's testimony.

Mr. Multer: That completes Yellin's testimony; yes, sir. Now, we come to the testimony of Spielfogel.

2229

The Court: That falls into two parts, doesn't it? Before and after the occurrence?

Mr. Multer: Before and after; yes, sir.

The Court: Now, his testimony, if I remember it correctly, insofar as it affects Indovino, refers to occurrences prior to the killing of Fox. He does not bring in Indovino after Fox is killed, does he? Am I correct, Mr. McGough?

Mr. McGough: I think you are wrong on that, on the Kovner testimony.

The Court: We are talking about Spielfogel. As far as Spielfogel's testimony is concerned, as it relates to Indovino, that is all, with reference to the occurrence prior to the killing of Fox.

Mr. McGough: That is correct.

The Court: He does not mention Indovino after Fox is killed.

Mr. McGough: No; my recollection is he has not.

The Court: Now, let us see—

Mr. Moulter: Of course, you have in mind that on the Spielfogel testimony we have the specific objection as hearsay by Spielfogel; that he is repeating what somebody else told him.

The Court: Well, now, let us reason that out. The agent of the two conspirators calls upon a prospective assistant. It is my contention that when the agent speaks the conspirators are speaking; that the agent is in the same category as the conspirator. In other words, my point is this, that when Yellin is speaking to Spielfogel, Indovino is speaking to Spielfogel and Beitler is speaking to Spielfogel; and the conversation between Indovino and Spielfogel would be competent, wouldn't it? In other words, if it were Spielfogel himself talking to Indovino, you would certainly have a right to show what they talked about concerning the proposed holdup. Now, it being ap-

parent that Yellin is Indovino and Yellin is Beitler, I hold that the conversation between Yellin and Spielfogel may be testified to both by Yellin and by Spielfogel, even though the shadows are in the background. In other words, when Yellin spoke to Spielfogel there were two people merged in the person of Yellin, namely, Beitler and Indovino; and Spielfogel may testify as to what was said between him and the agents of the holdup 2234
men. That is my reasoning. That is why I say the testimony of Spielfogel is competent and binding on the defendant Indovino. Now, do you have anything to offer—

Mr. Multer: Exception.

The Court (Continuing): In addition to what you have said on this point?

Mr. Moulter: No, sir.

The Court: Do you have anything to say, Mr. McGough, at this point?

Mr. McGough: I have nothing to add. 2235

The Court: You follow my reasoning?

Mr. McGough: Yes; I think your Honor is correct.

Mr. Multer: That covers the motions as against the specific individuals who testified here.

The Court: Have you covered them all?

Mr. Multer: Yes, sir; I believe I have.

The Court: Now, you have mentioned Kovner. I have covered that. You have your motion with reference to the vari-

ance of the testimony with the testimony adduced before the Grand Jury.

Mr. Multer: Yes.

The Court: There is absolutely no basis for that motion, because I don't know what was testified before the Grand Jury, and there is no evidence here as to what was testified to before the Grand Jury; and I am not a fortune-teller or a crystal ball gazer.

Mr. Multer: Then I ask your Honor to examine the Grand Jury minutes for the purpose of passing on this motion.

The Court: That is a new wrinkle in the law.

Mr. Multer: I think that is one that is necessary in the protection of the rights of these defendants.

The Court: That is something unheard of, that in a criminal case the Judge, after the People's case is concluded, must get the Grand Jury minutes and read them; and then if the evidence on the trial is at variance with what was testified to before the Grand Jury, to strike out the testimony. Motion denied.

Mr. Multer: I respectfully except.

Now then comes the objection about the variance of the proof with the indictment.

The Court: In what way does it vary? Point it out to me.

Mr. Multer: The indictment alleges a conspiracy between these three defendants and one Beitler.

2239

The Court: Yes. Isn't there evidence of a conspiracy? Why, they have got your man hooked up right at the beginning of the transaction, or at its very beginning.

Mr. Multer: Where have they got Beitler?

The Court: He is charged with being the tipster. He is charged with originating this holdup, which ended in the death of this patrolman. That is what the claim is. You say there has been no proof that he has been a member of the conspiracy?

2240

Mr. Multer: What was the conspiracy? The indictment charges one between these three defendants and Beitler.

The Court: That is right.

Mr. Multer: As a result of which Leon Fox was killed.

The Court: Where is there any failure of proof in that case?

Mr. Multer: I don't think Beitler has been tied into this with these defendants.

2241

The Court: Why not? They have got Beitler tied in with your client right at the beginning.

Mr. Multer: Got Beitler at the scene of the killing?

The Court: They have got Beitler at the scene of the killing.

Mr. Multer: Got Beitler doing the shooting?

The Court: Now, let us see.

Mr. Multer: In asking these questions,

of course, I mean to make the statement that they have not proved Beitler to be at the scene of the killing and they have not proved that Beitler did the killing.

The Court: They have not proved that Beitler was at the scene? In so far as Indovino is concerned, you mean?

Mr. Multer: Yes, sir.

The Court: What do you say about that, Mr. McGough?

Mr. McGough: There is some testimony here, your Honor, that this defendant Indovino, when he met Beitler and Kovner was present, that he berated him for shooting the policeman and not putting the gun in his back. I submit that that shows that Indovino knew Beitler was at the scene. There is also testimony here from the statement of Malinsky as to certain things Beitler did.

Mr. Geoghan: Also an accomplice.

The Court: We have statements by Malinsky; but they are not binding upon Indovino.

Mr. McGough: I understand that.

The Court: The statements of Malinsky would be evidence only as far as Malinsky is concerned.

Mr. McGough: That is merely to answer counsel's statement that the People have not proved that Beitler was at the scene.

Mr. Geoghan: Cannot prove it by Malinsky's statement, since your Honor said it was binding only on Malinsky.

The Court: That is right. In other words, if Malinsky says "Beitler was with me" that is binding on Malinsky only. That does not establish the fact that Beitler was there, as far as Indovino is concerned.

Mr. McGough: That is true, not as against Indovino. It certainly is against Malinsky. When counsel has said that we have failed to put Beitler at the scene, I say he is in error. 2246

The Court: As far as Malinsky is concerned; yes. We have got to look at this case as if we had only one man on trial here, Indovino; and all the other evidence that affects any other defendant must be divorced.

Mr. McGough: I would like to point out that if Indovino set this machinery in operation he himself is responsible for every single act of the others in furtherance of it.

The Court: But you have got to show the others did the job that killed the policeman. 2247

Mr. McGough: I submit that the conversation that was had subsequent to the shooting, over at the bar and grill on Houston Street, is a continuance of the conversation that Beitler and Indovino had a few nights before in the presence of Yellin; and that shows as against Indovino that Beitler was there.

(At this point there was an outburst

2248 by one of the defendants which was unintelligible to the stenographer).

Mr. McGough: (Continuing): When he berated Beitler for shooting him and for not putting the gun in the back. I say that shows that he knew he was there.

Mr. Multer: Let us take the testimony as it is.

Mr. Geoghan: Who testified to that?

2249 Mr. McGough: Kovner, yesterday afternoon.

The Court: Well, let us try to simplify this thing and reason aloud. Suppose Indovino were on trial here all alone and there is no other defendant on trial. Let us take this thing step by step, because after all is said and done, we want to do the right thing in the case. We don't want to make any mistakes about it. You have got Yellin's testimony; you don't have to go over that again. You have

2250 testimony here from which a jury might conclude that a conspiracy was hatched to commit a robbery upon a policeman and a theater manager out in Coney Island. You have got Indovino part and parcel of that conspiracy; in other words, that he was the tipster, he was the one that originated the idea, he brought the information to the holdup men and said to them, "I cannot go with you because I am known in the neighborhood where this occurred." As far as he is concerned you stop there and then you prove

2251

that somebody or somebodies went out to Coney Island and killed this policeman. You have not established the identity of these defendants.

Mr. McGough: Don't forget I have one of these defendants on trial at that particular conversation.

The Court: What defendant?

Mr. McGough: With Kovner and Indovino, and it was in the presence of Malinsky; and as long as this is a conspiracy—

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The Court: No, no, wait a minute; wait, now. That is all very true, but you have stopped with the conspiracy. Let us even put Malinsky there at the time the conspiracy is hatched, and let us see if that helps the situation in so far as Indovino is concerned. You have got the conspiracy hatched. That is clear. "We are going out and hold up a cop and a theater manager" and so on. The scene then shifts to Coney Island, as far as the testimony is concerned, and you have proved (that is in a prima facie way) that a policeman was murdered in cold blood on West 12th Street, and that a helpless man was robbed of $770, I think it was. There is not a word of testimony as to who did it, coming from an independent source. Now, it may very well be that the plot was hatched, but in order to convict this defendant of murder you have got to prove that these conspirators killed this policeman or had a hand in the robbery, and that the robbery

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was perpetrated by them. You have got to prove that against this particular defendant. You have got to prove that against the other defendants, it is true; but he has the right to insist that you prove it against him. You cannot prove that against him by the admissions of other defendants made after the arrest, or by admissions to police officers or District Attorneys, or by admissions made by

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other defendants to other people after the occurrence, unless he took part in these admissions. Now, the only thing you have got here is Kovner's testimony concerning Indovino's conversation with Beitier, when he said to him, "You should not have shot this policeman"—words to that effect—"it was unnecessary." Now, that is the only thing that is before the Court now that may tie this defendant Indovino into this case, because without that you have nothing.

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Mr. McGough: Of course, I respectfully disagree with your Honor.

The Court: Point it out to me, Mr. McGough. I am not arbitrary or pigheaded about it. I would like to listen to what you people have to offer.

Mr. McGough: I think your Honor has approached the subject with great care and you have scrutinized every piece of evidence. I say that the argument that the People have to show by other independent means that what was accomplished was accomplished in a different

fashion than the way here, is tenuous. In other words, to say that a man who has tipped a number of his pals and cronies off to a killing cannot be shown to be in that conspiracy to kill, solely from his conversation at the time was hatched, alone is sufficient. If there is a killing established down there, it is true that by the statements which were made by the co-defendants as to what they did, is not to be used against the tipster; but 2258
I say that the tipster himself can be shown to have tied himself in to the extent of saying, "The place is in Coney Island; the cop will give up; it is a manager," and then say, "I cannot go because of living there"—I say if he does that much all the rest is just cumulative and circumstantial as far as he is concerned.

The Court: I do not think we see eye to eye on this thing. Maybe I have not made myself clear. Let us take another case. 2259
Suppose a man is on trial for murder and he is charged with being a tipster and he is sitting alone in the defendant's chair. Let us say that he has approached another man—and to make this simple let us say there were only two in on the job, A being the tipster and B being the hold-up man. Let us say that A says to B, "There is a job that you can pull off over at the Chemical National Bank on Court Street." B says, "Fine! I will do it." Some time thereafter the Chemi-

cal National Bank on Court Street is held up, but who held up the bank nobody knows. As far as the tipster is concerned let us assume that he is alone on trial. You do have evidence, however, that subsequent to the occurrence, subsequent to the time when the bank was stuck up A meets B and A, the tipster, says to B, "You should not have shot that bank teller at the Chemical National Bank. You did not have to do that." That is this case, isn't it?

Mr. Geoghan: Exactly.

Mr. McGough: Then that man comes back and says, "I am hot; I am not going to have a cop identify me" that shows that they were talking about the same thing.

The Court: They were talking about the same thing, but does that establish the fact that somebody—that B committed the act. That is the point.

Mr. McGough: I say that is some evidence that can be considered by the jury on that subject. I say I have a little stronger case here because of that added conversation of Indovino's, after the event.

The Court: That is the conversation we are talking about. Without that you have no case—none.

Mr. McGough: I respectfully submit that as the record now stands we have enough to proceed as against Indovino as well as the others.

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Mr. Multer: What he is asking you to do in effect is to say here that because somebody says he saw Indovino in the company of Beitler after the happening of this crime, and telling Beitler he should not have committed the crime, a shooting—

The Court: Not a shooting, the shooting, this particular shooting.

Mr. Multer: Let us make it stronger than that—this particular shooting.

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The Court: Yes.

Mr. Multer: That that puts the person he is accusing on the spot because that fellow says, "I don't want a cop to identify me", and the cop is already dead; that that is an admission by B that he did the killing, that he was there and that that is proof against Indovino, mind you, beyond a reasonable doubt, that Beitler was there and did the killing.

The Court: You certainly have to prove that this policeman was killed by one of these conspirators, because even though the conspiracy was hatched, if you do not establish that the policeman was killed by one of these conspirators, you have got no case of murder against the conspirators. Some other gang might have gone out and killed the policeman. We are just speaking as a matter of law—it would be far-fetched to say that is the fact—it would be ridiculous to say it.

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Mr. Multer: It would not have been

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ridiculous to say it might have been some other tipster and it might have been some other gang, with Beitler in the middle.

The Court: In other words, just because the conspiracy was hatched it does not necessarily follow that these conspirators committed the crime.

Mr. Geoghan: It must be proven.

The Court: It must be proven. Now where is the proof?

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Mr. Geoghan: We were all satisfied in that conference that there is no proof.

Mr. McGough: Here is the testimony: He said—I am referring now to the conversation—"You are too fast." He says, "You got too hot. You did not have to shoot him. All you had to do was to put the gun up against his back." He said, "What did you shoot him for?" He was referring to the cop in Coney Island.

The Court: That is right. I appreciate that.

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Mr. McGough: I submit that is enough.

The Court: Here is what it boils down to: Does the admission of B in the hypothetical case we discussed concerning the Chemical National Bank—does the admission of B, made on a street corner, that he stuck up the Chemical Bank, establish that fact? Suppose the admission were not made to Indovino. Suppose it were made to Tony Marone, and Tony Marone came in and said, "Yes; a man by the name of Beitler said to me that I stuck up that

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cop, I shot and killed him." Does that establish the crime?

Mr. McGough: No; that is clear.

The Court: Is the situation altered because the admission is made to Indovino?

Mr. McGough: I say the admission is made in answer to a conversation on the part of this tipster.

The Court: Assume that that is so, does that alter it in any way? Does that establish that he killed the man? 2270

Mr. McGough: No; but it helps to clear and define what the tipster meant when he said, "You did not have to kill him."

The Court: Does that establish the fact that Beitler did the killing, because they had this talk between them? I would like to hear Mr. McGough on that point.

Mr. McGough: Your Honor, you appreciate there is a conspiracy here. The killing was not the act of Indovino alone. In every conspiracy, of course, you have certain things you can prove against some and certain things you cannot. Everything before the killing, of course, the act of one is the act of all. 2271

The Court: Right.

Mr. McGough: I say again that Indovino started this thing off, and it is shown by other proof in the case that some one of those persons that he himself conspired with, at some stage before the killing—it is shown so—I say it is enough to show

that he was killed, as against Indovino. I say it is not necessary for the People to show any one of the four of them did the killing.

The Court: Any one of the four or their agents?

Mr. McGough: Wait a minute. So far as he knew. In other words, that Indovino said on the 12th of February, "There is a good job in Coney Island; go down and pull it off" and then took a plane or boat to Europe, and did not even go on with it; I say if the People come in at a later date and prove that some one of those four conspirators, by their direct statements, or by independent proof, that the killing was done by one of them; I say I don't have to tie him up any further than the conversation of Indovino at the beginning.

Mr. Geoghan: We come back to where we started: Where is the proof of the killing by any one of these four?

The Court: We go back to this proposition: That A and B in the Chemical National Bank case—if A is the tipster and B says, "I will go and stick up the bank" and at some subsequent date a bank teller is killed and A is alone on trial you have no case against A, have you? That is the point. That is as simple and as clear as daylight. The mere fact that there was a conspiracy to rob which resulted in a robbery and a killing, and where you do not tie up in any way

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the actual killers or the persons that participated in the robbery, with the tipster—

Mr. McGough: I say we have.

The Court: Except by an admission of one of the alleged conspirators made after the event, on the street; the question is whether that establishes the killing by the conspirators or their agents.

Mr. McGough: Why, Judge, here—I don't know whether anybody has forgot- 2276
ten it—I say you have Indovino and Malinsky together at the time that Kovner and Beitler spoke to him. We have an admission in the record that Malinsky himself killed him.

The Court: Let us not waste any time—

Mr. Geoghan: That is against Malinsky alone.

The Court: Let us not waste any time —suppose Indovino were on trial alone. Could you bring in Malinsky's confes- 2277
sion?

Mr. McGough: Oh, no.

The Court: You could not?

Mr. McGough: That is understood.

The Court: As far as this man is concerned, Indovino is on trial and there is not a soul next to him; he is on trial alone. You cannot help yourself to evidence that applies to another defendant in aid of a co-defendant, evidence concerning admissions made after the occurrence. That is elementary.

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Mr. McGough: It narrows down to this: If Indovino merely told Malinsky, "Go down and stick him up" and somebody heard that conversation, and later on it developed from independent sources that Malinsky did it; I submit that is still competent.

The Court: There is no evidence that Malinsky did it.

Mr. Geoghan: There is no evidence that
2279 Indovino said, "Go down and stick him up."

Mr. McGough: Let us take one thing at a time.

The Court: There is not a shred of evidence here as far as Indovino is concerned of Malinsky having anything to do with this killing.

Mr. McGough: No, but standing on trial, I say that if Indovino started out and the plot was put in motion, if Malinsky admits something as against him—

2280 The Court: After the occurrence?

Mr. McGough: You mean the confession after the occurrence?

The Court: That is all there is here. The admissions are made after the occurrence.

Mr. McGough: Then I fall back to this, that if he made the original conversation that has been testified to here and at a later date berated one of those that were out on the particular crime, I say that is enough.

The Court: The question is: Has it

been shown he was out on the particular crime? That is the point. Has it been shown that Beitler was out on this particular crime?

Mr. Geoghan: The record is barren of any such proof.

Mr. McGough: Your Honor says that the proof he was out must be corroborated by outside sources?

The Court: That is not what I said at all. I am debating with you whether 2282
there is any proof at all.

Mr. McGough: Proof on which point?

The Court: That one of these co-conspirators committed this crime or their agents committed the crime. As far as Indovino is concerned, sitting alone, without these other two beside him and with every bit of proof eliminated from the case that applies to others and not to him, what have you got against him that proves your case beyond a reasonable doubt as a matter of law? 2283

Mr. McGough: Well, if your Honor please, if there should be any more than what we have discussed, I think I would like time to take this matter up.

The Court: I think this is important enough to think over the week-end and not to be precipitous. After all, a policeman's life was taken—it would not make any difference if a Chinaman's life was taken—but a life was taken; and I think the District Attorney ought to be given a little opportunity to reflect on the motion;

and to give him all the opportunity in the world to advance any arguments that he may desire to offer to the Court. For the present, I will deny the motion.

Mr. Multer: Exception.

Mr. Geoghan: Do you want us to go into our evidence or to put it over and take it up on Monday morning?

The Court: Let the other defendants proceed. The motion that I am denying now is the motion to dismiss the indictment for failure to make out a prima facie case. That is the motion.

Mr. Multer: That motion is made not only because they did not make out a prima facie case, but also on the ground there has been a variance between the proof submitted here and the indictment, and the District Attorney's opening.

The Court: I don't recall just what you have in mind.

Mr. Multer: It is the same argument.

The Court: I will deny the motion at this time.

Mr. Multer: Exception.

The Court: Let us take the next one.

Mr. Multer: The last motion is to dismiss the indictment, and in making this motion I ask that the Grand Jury minutes be considered as part of the motion. This motion is that the indictment is insufficient and must be dismissed because the proof submitted to the Grand Jury is insufficient, and if it is found that some of the proof may have been added here that should have been submitted to the

Grand Jury, which was not submitted to the Grand Jury in the first instance, the indictment was faulty and we cannot be called upon to answer it.

Mr. Geoghan: That is the motion I was about to make. In other words. Yellin was the only one who testified before the Grand Jury.

The Court: I don't know who testified.

Mr. Geoghan: That is from the testimony here; Kovner said— 2288

The Court: Might have had other witnesses who died. I don't know. I am not a mind reader or a crystal-ball gazer.

Mr. Geoghan: The testimony is here that Kovner was not in this case until Monday.

The Court: That is true. There may have been other testimony before the Grand Jury.

Mr. Carabba: Your Honor, Kovner said he was not before the Grand Jury.

Mr. Geoghan: So Yellin was the only one that testified. 2289

The Court: I don't know who went before the Grand Jury and you do not either.

Mr. Geoghan: The motion was denied for the inspection.

The Court: You did make a motion?

Mr. Geoghan: Yes; we did, on behalf of Indovino. It was denied. If it had been granted, the indictment would have been dismissed on the Grand Jury minutes.

Mr. Multer: I think your Honor should have before you the Grand Jury minutes when you pass on this motion, even though it is a burdensome thing to look at the Grand Jury minutes.

The Court: I will deny it for the present.

Mr. Multer: May we have the Grand Jury minutes marked for identification as a part of this motion?

The Court: We will not do that. You need not have any worry about that.

Mr. Multer: That completes the motion on behalf of the defendant Indovino.

The Court: Now I will hear Mr. Carabba or Mr. Meadow. Who is going to make the motion?

Mr. Meadow: I have the same difficulty as yesterday. I just had the two motions, and he was going to make a general motion. I think I am a little more familiar with these motions, your Honor.

Mr. Carabba: We asked your Honor's permission last night to be permitted, if your Honor would, this morning to add to the motion that I made yesterday.

The Court: You have the permission, Mr. Carabba.

Mr. Meadow: I move to dismiss the indictment as in violation of Section 258 of the Code of Criminal Procedure and further in violation of Section 399 of the Code of Criminal Procedure.

The Court: What is that?

Mr. Meadow: Section 258 is where the

Grand Jury ought to find an indictment when all the evidence before it, taken together, is such as in their judgment would if unexplained or uncontradicted warrant a conviction by a trial jury.

The Court: You have in mind the Nitzberg case.

Mr. Meadow: Yes.

The Court: Shorten the whole proposition. In other words, if I understood you correctly, Mr. Meadow, your contention is that the evidence before the Grand Jury must necessarily have been insufficient? 2294

Mr. Meadow: That is right.

The Court: Therefore this whole proceeding is a nullity?

Mr. Meadow: Yes, sir; that is it.

The Court: That is the point?

Mr. Meadow: That is the point.

The Court: I do not need any elaboration. I think I am familiar with the Nitzberg case.

Mr. Meadow: Yesterday I omitted the sections. 2295

The Court: Is that your whole point?

Mr. Meadow: That is all.

The Court: I will deny your motion at the present time.

Mr. Meadow: I want to include Section 399, that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

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The Court: I deny your motion on that ground.

Mr. Carabba: If your Honor will permit me to complete my motion that I made yesterday on behalf of the defendant Rudish, I will say this: I respectfully move your Honor to direct the jury to find a verdict of not guilty upon the following grounds: That there has not been produced upon this trial substantial and believable evidence justifying its submission to the jury, under the decisions of the Court of Appeals.

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The Court: Motion denied.

Mr. Carabba: And on the authority of People against Ledwin, 153 New York, 10.

The Court: Motion denied.

Mr. Carabba: I move further to dismiss and ask for an acquittal upon the ground that the prosecution has failed to submit to this Court what they alleged they would prove as against the defendant Rudish in their opening.

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The Court: Motion denied.

Mr. Carabba: I respectfully except. I say to your Honor—

The Court: Do I understand, Mr. Carabba, that you made a motion for a severance in this case?

Mr. Carabba: No, I did not. I was under the impression that we did, and I just asked Mr. Meadow. We had discussed it.

The Court: Do you make a motion for a severance?

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Mr. Carabba: No, I don't. I am going to stand on this record.

The Court: You don't want a severance?

Mr. Carabba: Not at this time, Judge Leibowitz.

The Court: I take it, Mr. Geoghan, that you have made a motion for a severance, haven't you?

Mr. Geoghan: No, I did not.

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The Court: You don't want a severance, do you?

Mr. Geoghan: No; I don't think so. I would like to confer, however, with my associates. That is how I feel. I will go in conference with the associates if you will just give me two minutes. The reason I say—maybe I answered too quickly—what I meant was I did not make a motion. I do not mean I would not—

The Court: You are not making application for a severance?

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Mr. Geoghan: Not at the moment. I mean I may have at some time.

The Court: I am going to ask you right now: Do you make any motion for a severance in this case?

Mr. Geoghan: I am only one of three.

Mr. Carabba: Will your Honor give me an opportunity to consult with my colleagues?

The Court: Surely.

Mr. Geoghan: I think we should speak to the defendants too.

The Court: Surely. I just wanted to

be clear, whether you at any time desired a severance or moved for a severance, or even now move for a severance.

Mr. Geoghan: I do not, but I had discussed it with the others. Give us a little time.

Mr. McGough: On the record, while counsel is talking to the other, I have three exhibits, People's Exhibits 3, 8 and 9 and 10, all in evidence; those were photographs on which there was some writing on the back. I have obtained exact copies made from the same negatives of those, and after talking to counsel for these defendants I am going to ask your Honor to permit the stenographer to strike off the exhibit numbers on the backs of the exhibits that have writing on them, and place the numbers on the new ones which have no writing.

The Court: I take it that is agreeable to counsel?

(Mr. Multer examines the substitute photographs, and consents.)

(There was a short recess during which counsel leave the court-room and return.)

The Court: All right, Mr. Geoghan, I will hear you on that point now.

Mr. Geoghan: What point was that?

The Court: Do you desire a separate trial for your client?

Mr. Geoghan: No; we are satisfied with the record as it is.

The Court: You raise no objection to the trial as it is?

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Mr. Geoghan: We stand as we are. The defendant himself says so.

The Court: Satisfied to stand trial with the other defendants?

Mr. Geoghan: That is right.

The Court: Is that the same position--

Mr. Carabba: Same as to the defendant Rudish, after conferring with my colleagues and with the defendant himself.

The Court: You raise no point, is that right, under the Fiola case, or such matter as that? 2306

Mr. Geoghan: No.

The Court: You don't?

Mr. Geoghan: No, Judge.

The Court: That is right, Mr. Carabba?

Mr. Carabba: I don't know anything about the Fiola case. All I can truthfully answer, your Honor, is that we do not wish a severance at this time.

Mr. Geoghan: That is the same for Indovino.

The Court: All right, bring down the jury. 2307

(The jury return to the room.)

Mr. McGough: The sister of Harry Levine is here. May I at this time ask for leave to reopen?

The Court: Yes; just for that purpose.

2308 *Esther Levine—For People—Direct*

ESTHER LEVINE, residing at 341 Chester Street, Brooklyn, N. Y., called as a witness in behalf of the People, being first duly sworn, by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Miss Levine, I show you a photograph, marked People's Exhibit 15 in evidence, and I ask you if you know that man? A. Yes; I do.

2309 Q. Who is he? A. My brother.

Q. What is his name? A. Harry Levine.

Q. What is his nickname? Did he have a nickname? A. Hersh.

Q. When was the last time you heard from your brother, Harry Levine? A. Sometime in May.

Q. 1943? A. Yes.

Q. At that time where was he? A. Last I know of it he was in England.

Q. What was he doing in England? A. He is in the armed forces.

2310 Q. Did you receive a letter from him sometime after May 14th, 1943? A. No; I did not.

Q. After May 14th, 1943, did you receive a letter from him? A. No.

Q. Will you look at this paper, please, and tell me whether you cannot refresh your recollection on that? (Showing) A. This was the last letter I received.

Q. What was the date that was on the letter that you received last? A. May 14th.

Q. Was this the date he wrote the letter? A. Right; that is right.

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Q. Was it sometime after that you received the letter, is that right? A. That is right.

Q. You have not heard from him since, is that right? A. No.

Mr. McGough: All right.

The Court: Do you want to cross-examine this witness.

Cross-examination by Mr. Solovei:

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Q. When was it your brother went into the Service? A. Sometime in February, I believe.

Q. What year? A. He was there two years.

Q. February, 1943? A. About that, yes.

Q. Do you know when? A. No; I don't know just when.

Q. Do you know the date? A. No.

Q. About how long was he in the States after he enlisted in the Service? A. About three or four months.

Q. He visited you for three or four months? A. That is right.

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By the Court:

Q. How long after he went in the Service did he get a uniform, did he stop wearing civilian clothes? A. As soon as he got in the Army.

The Court: Any further question, Counsellor?

Mr. Solovei: I don't understand why your Honor asked that.

The Court: You paused there. Proceed.

Mr. Solovei: I am asking the question.

The Court: Proceed. There was considerable pause there, and I thought you had concluded. Proceed, please.

By Mr. Solovei:

Q. You say he was about three or four months in the vicinity of the State of New York, would you say? A. I would say he was in the United
2315 States for three or four months.

Q. Did he visit you at your home? A. That is right.

Q. Did you see him in 1942? A. I have not seen him for sixteen months.

Q. But you did see him, you say, in March, April or May of 1941? A. That is right.

Redirect examination by Mr. McGough:

Q. I have one more question to clear up something in my mind. Harry Levine went right in the Army from Elmira Reformatory, didn't he?
2316 A. Yes.

Q. In other words, he did not come home—he was released from Elmira, and went right in the Service? A. No, he was home some time.

Q. You mean between the time he came out of Elmira and he went in the Army he was home in Brooklyn? A. That is right.

Q. Sure about that? A. Yes.

Q. Where did he live in Brooklyn? A. 715 Hopkinson Avenue.

Q. Is that with you? A. Yes.

Q. Are you sure of the dates? Did he get out of there in 1941? A. Yes.

Q. Do you remember which month? A. No; I think it was March.

Q. He came out of Elmira in March? A. That is right.

Q. All right—1941? A. Yes.

Recross-examination by Mr. Solovei:

Q. How long was he in Elmira? A. 21 months.

Mr. Solovei: No further questions. 2318

Mr. McGough: Now your Honor, I have one short motion, please. Your Honor, at this time, may I move to amend the indictment so that the name of Morris Malinsky is changed to read "Morris Malinski, also known as Morris Malinsky".

The Court: Any objection to that, Mr. Solovei?

Mr. Solovei: I don't think so.

The Court: Motion granted.

Mr. McGough: The People now rest.

Mr. Geoghan: I don't know if it is necessary, if he is resting now, that we renew all the motions made at the close yesterday. 2319

The Court: The same motion is deemed to have been made at this time by each of the counsel; same disposition by the Court; and the same exceptions.

2320 *Joseph Brigandi—For Deft. Indovino—Direct*

JOSEPH BRIGANDI, residing at 1935 West 7th Street, Brooklyn, N. Y., called as a witness in behalf of the defendant Indovino, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. Geoghan:

Q. What is your business? A. I am in the shoulder-pad line.

2321 Q. What is the name of your company? A. Three Star Shoulder Pad Company.

Q. Is that a corporation? A. It was, and now it is all alone.

Q. Were you an officer of the company? A. I am foreman.

Q. You were the foreman? A. Foreman, I am foreman.

Q. Are you still the foreman of the Star Shoulder Pad Company? A. Yes.

Q. Where is that company located? A. Now located at 104 and 106 14th Street, New York.

2322 Q. Where was it located during the year 1941? A. 635 6th Avenue.

Q. In Manhattan? A. In Manhattan.

Q. New York City? A. Yes.

Q. Do you know the defendant, Joseph Indovino, who is sitting at the extreme left of the courtroom here? A. Yes.

Q. Is he related to you in any way? A. Yes.

Q. What relation? A. My brother-in-law; I married his sister.

Q. Did Joseph Indovino ever work for the Star Shoulder Pad Company? A. Yes, he did.

Q. When did he first go to work there? A. As

far as I remember, April, 1939; part of 1939 and part of 1941.

Q. When he first went to work for you, was that a short time after he came out of Elmira Reformatory? A. Yes.

Q. About how long after, do you know? A. I don't remember; must be—I don't remember—three or four months.

Q. A short time? A. Yes.

Q. How long did he work for you the first time? A. About two years. 2324

Q. And then was there a time when he left your employ? A. He left a short time, then he came back again.

Q. How long was he away from your employ, out of your employ? A. It is a very short time; after about maybe a few months, and came back again.

Q. Was that the time he went in business for himself?

Mr. McGough: Don't lead him, Mr. Geoghan, I object. 2325

Mr. Geoghan: I will withdraw the question. It makes no difference.

By Mr. Geoghan:

Q. He came back to you at any rate after the end of you say three months? A. Yes.

Q. And continued to work for you up till what time? A. Up until about in July.

Q. Of what year? A. 1941, about that time, yes.

Q. Then it was he went into other employment?

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A. Well, I don't know where he went then; he must have worked other employment.

Q. He left your employ? A. Yes.

Q. What kind of work did he do in your company? A. He worked as operator on a machine, sewing machine.

Q. Was he a steady workman? A. Yes.

Q. Did he work every day? A. Every day when there was work. Sometimes there was no work.

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By the Court:

Q. Sometimes, there wasn't what? A. Sometimes there wasn't any work.

Q. Sometimes there was no work? A. Yes; wasn't any work.

By Mr. Geoghan:

Q. In which time, of course, he did not work, is that it? A. (No answer.)

Q. You mean there were long periods of time that he did not work for you? A. He worked all

2328

the time. Sometimes the shop is closed, naturally, no work for anybody. That is what I mean. But every time he is ready in the shop when there was work.

Q. During the time he was in your employ was he ever away except for those three months, even a week at a time? A. No.

Q. You mean a matter of days? A. Yes.

Q. When there was no work on hand? A. Yes.

Q. Was he paid by the day or did he do piece work? A. Piece work.

Q. As the foreman you are familiar with just

about what his average earnings were, I assume? A. Yes.

Q. What did he average per day while he was working for you? A. Sometimes seven dollars a day, eight, nine, or less, according to the work all day—in this work that is the way it is.

Q. Would you say a fair average was thirty-five, forty dollars a week? A.. Thirty-five, forty dollars.

Q. Were his habits always steady while he was with you? A. Yes. 2330

Q. Sober, industrious? A. Steady.

Q. Did you receive a letter from the District Attorney's office of Kings County?

Mr. McGough: I object to that.

Mr. Geoghan: Let me finish it, please.

By Mr. Geoghan:

Q. Requesting information about Indovino's work with you? A. My boss received it.

Q. Did you reply to that communication? A. I don't know if he did. I suppose he sent a letter back to the District Attorney, and he told me, the boss. 2331

Q. Who sent it? A. The boss.

Mr. Geoghan: At this time I call upon the District Attorney to let me have a copy of the communication he received.

Mr. McGough: I intend to cross-examine this witness on that.

Mr. Geoghan: All right; your witness now.

2332 *Joseph Brigandi—For Deft. Indovino—Cross*

Cross-examination by Mr. McGough:

Q. When you say, "the boss", you mean your wife, don't you? A. My wife.

Q. Isn't your wife the owner of the company? A. No.

Q. Isn't your wife, Mrs. Brigandi, related to Indovino? A. Yes.

Q. Didn't she own this Shoulder-Pad Company when Indovino went to work for her? A. No.

2333

Q. Is that so? Sure of that? A. Very sure.

Q. Have you ever been convicted of a crime? A. Never.

Q. Now you told this Court and jury, he earned about thirty-five or forty dollars a week, is that right? A. That is what I think. Exactly,—I am not working in the office—I am the foreman inside the shop. The office work, I don't know exactly, but I believe they must earn that much, thirty-five, forty dollars a week.

Q. You are not sure of what he earned; is that a fact? A. Of course not.

2334

Q. But there were times for months in a row when you never even saw him at the Shoulder-Pad Company, isn't that right? A. Beg pardon. Say it again.

(Question read.)

A. No, I saw him all the time, right over there.

Q. Sure about that? A. Sure.

Q. Isn't your business a seasonal business? Do you work two months and then you are off

two or three months? A. The most we work is steady; and sometimes slow down. You know, during the week, a few days, two or three days, when there is no season. 2335

By the Court:

Q. If I understand you correctly, he was paid by the piece? A. By the piece, yes.

Q. If he did not want to work, he did not have to work, and the boss did not pay him; is that right? A. Naturally, did not pay him, but he worked all the time. 2336

Q. I didn't ask you that. Was he paid to work all the time or did he work and get paid exactly for what he did? A. Piece work—pieces.

Q. Working piece work? A. Yes.

Q. He got paid for the exact number of pieces? A. That is right.

Q. He did not get paid by the hour, did he? A. No, no.

Q. And some days he would work and some days he would not work, is that right? A. Yes.

2337

The Court: Anything further from this witness?

Mr. McGough: Yes, Judge. Just a minute, please.

By Mr. McGough:

Q. What is the name of the owner of the Three Star Shoulder-Pad Company now? A. Star Shoulder-Pad Company now.

Q. What is the name of the owner? A. Charlie Weiner.

Q. Charlie Weiner? A. Charlie Weiner.

Q. Is he the full owner? A. He is the owner.

Q. What part does your wife own? A. Who?

Q. What part does your wife own? A. My wife? Nothing.

Q. Your wife does not own any of the Shoulder-Pad Company? A. No.

Q. At the time this defendant Indovino went
2339 to work where you were, your sister was the owner of that Shoulder-Pad Company, isn't that correct? A. No.

Q. Mrs. Brigandi? A. Never was the owner; no.

Q. Does your wife own a Shoulder-Pad Company, besides this Three Star? A. No; never owned—she worked, but not the owner.

Q. She works? A. She works.

Q. Did she ask the boss at that time to let Indovino work at that place? A. Yes, sir.

Q. And the Parole Board was given that address as his place of employment; is that right?
2340 A. Yes, sir.

Q. Did you say he worked there from 1939 to 1941? A. Yes; part of 1939 and part of 1941; exactly I don't remember the right date.

Q. Sure about that? A. Very sure.

Q. Can you read English? A. Yes; a little.

Q. Will you look at this letter, please, and tell me if that does not refresh your recollection (showing)? A. Aloud?

Q. Don't read it aloud; look at it and tell us whether that does not refresh your recollection as to whether he worked there in 1939? A. Yes;

one thing I see over here, I see 1939; it is 1939 but it does not say over here. I should say 1939.

Q. Does not show 1939 on this paper I gave you? A. No; that is what I remember.

Q. Isn't it a fact he went to work there in 1941? A. No. 1939, 1939, I remember.

By the Court:

Q. When did he get out of prison? A. I don't know. 2342

Q. You don't know? When did he come out of prison from Elmira? A. I don't know. It is 1938 or 1939, I don't remember.

By Mr. McGough:

Q. You are not sure of the dates, are you, Mr. Brigandi? A. No, I am not sure of that.

Q. Isn't it a fact that he only worked there for very short periods, a couple of weeks at most, a month; isn't that the fact? A. No.

Q. Isn't it a fact that on one period, ending 1942, in March, he only received $46.78? A. I don't know that. 2343

Q. Isn't it a fact that at another time he received a total of $191.92 for a three-months period? A. I don't know.

Q. Were you mistaken when you said he was earning, seven, eight and nine dollars a day? A. If he worked steady all week he does receive thirty-five to forty dollars. If he is slow, naturally he received less. He worked all days.

Q. Isn't it a fact there were long periods of times, week after week, after week, when he did

2344 *Joseph Brigandi—For Deft. Indovino—Cross*

not work there? A. The most I see him work all the time. If a few days of a week slows down, naturally there was no work, he would not work.

Q. Listen to me, please, and see if this is not correct, according to your knowledge: For a three-months' period ending March 30, 1941—

Mr. Geoghan: I object to counsel reading from a paper here that is not in evi-
2345 dence.

Mr. McGough: I am asking him if it does not refresh his recollection.

Mr. Geoghan: I know, but he is in front of the jury reading from a communication, and I object to it.

The Court: Sustained.

By Mr. McGough:

Q. You have a bookkeeper at your plant? A. Yes; there is a bookkeeper.

Q. What is his name? A. Now, he has got
2346 a new bookkeeper. I don't know the name. One week.

Q. Do they have a time clock up there that the employees punch going in? A. Not piece work people. They have a time clock; yes; not for the people who work piece work.

Q. The timekeeper would know how much time the piece worker has put in, is that right? A. Yes.

The Court: Says they don't keep any time.

2347

Mr. McGough: He says they don't punch the clock.

The Court: That is right; piece work workers do not punch the clock.

By Mr. McGough:

Q. But the bookkeeper knows how much time Mr. Indovino spent? A. No.

Q. No. A. No.

Q. The timekeeper does not know? A. No.

2348

Q. The only one that knows how much time Indovino spent at that place is yourself, is that right? A. Yes.

Q. You are the only one? A. Yes.

Q. You are his brother-in-law? A. Well, yes, sir.

Mr. McGough: That is all.

Redirect examination by Mr. Geoghan:

Q. In other words, you are the foreman of the plant, and you would be the one who would see him in there, working? A. Of course.

2349

Q. By the way, did your company have any other name previously? A. Yes.

Q. What was the name of it? A. Three Star Shoulder-Pad Company.

Q. Then it changed it to Star Shoulder-Pad Company? A. Yes.

Q. But it was the same concern? A. Same concern.

Q. And the defendant worked there when the company was known under one name and under another? A. Yes.

2350 *Joseph Brigandi—For Deft. Indovino—Redirect*

By the Court:

Q. Where was this concern located in the month of February, 1941? A. 635 Sixth Avenue.
Q. Near what street? A. Sixth Avenue.
Q. Near what street? A. 19th Street, on the corner.

By Mr. Geoghan:

2351 Q. How many people are employed there?

Mr. McGough: Objection.

A. 23, 24.

By the Court:

Q. About how far away is 19th Street and Sixth Avenue from the neighborhood of Seventh Street on the east side?

Mr. Geoghan: I object to the question.
2352 The Court: Overruled.

A. Right on the corner.

By the Court:

Q. How far away is 19th Street and Sixth Avenue from the neighborhood of Seventh Street and Eighth Street and Ninth Street on the east side, and First and Second Avenues, and Avenue B and C, and so on; about how far is one locality from another?

2353

Mr. Geoghan: I again object to that question because it conveys a wrong impression to the jury.

The Court: No; I am not trying to convey any impression.

Mr. Geoghan: It speaks for itself when you ask how far away is Eighth Street and Ninth Street.

The Court: I want to find out how far one place is from another.

2354

A. From where we are working now?

By the Court:

Q. Where you were working in February, how far was that location from the east side, around Fifth Street? A. It is 14th, 19th, must be three or four blocks.

Q. You are 19th Street and Sixth Avenue in February, 1941? A. Yes.

Q. Between the first of February and the 15th of February? A. Yes.

2355

Q. That would be the 15th of February, and say the first of March, were you located at one place? A. Yes.

Q. Where was that place? A. On the corner of 14th Street.

Q. 14th Street? A. And 6th Avenue, right a few feet—

Q. If you wanted to go from 14th Street and First Avenue down to the east side around Houston Street and First Street and First Avenue, Avenue A, Avenue B, et cetera about how much of a distance would that be?

2356 *Celia Indovino—For Dft. Indovino—Direct*

Mr. Geoghan: I object to that again.
The Court: Overruled.

A. I presume about a few avenues.

By the Court:

Q. It would be from 6th Avenue down around First Avenue and then from 14th Street down to whatever block you wanted to go; is that
2357 right? A. Yes.

The Court: Of course, Mr. Geoghan, the questions asked by the Court are not to be considered by the jury of any significance whatever. I am just trying to locate the two points on the map. That is all.

Mr. Geoghan: All right.

2358 CELIA INDOVINO, residing at No. 2118 Ocean Parkway, Brooklyn, N. Y., called as a witness in behalf of the defendant Indovino, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. Geoghan:

Q. What was your maiden name? A. Celia Scurra.

Q. You are presently the wife of Joseph Indovino, one of the defendants on trial in this case, aren't you? A. Yes.

Q. When did you first meet Joe Indovino, your present husband? A. In the summer of 1939.

Q. Louder. A. In the summer of 1939.

Q. 1939? A. Yes.

Q. You were introduced to him at that time, I assume, by somebody? A. Yes.

Q. By whom? A. A cousin of mine.

Q. We cannot hear you. A. A cousin of mine; a relation.

Q. What is the name? A. Patrick Peleterri. 2360

Q. Where did Joe live at that time, that is, in 1939? A. He lived on West 8th Street.

Q. Near where? A. Near Avenue U.

Q. In Brooklyn? A. Yes.

Q. And with whom did he live there? A. With his mother and father.

By the Court:

Q. Let us see; West 8th Street, is that in Coney Island? A. No, not in Coney Island.

Q. West 8th Street, corner of where? A. That is near Avenue U. 2361

Q. Would that be Bensonhurst? A. No, it would be Gravesend.

Mr. Geoghan: Are you finished, Judge?
The Court: Proceed.

By Mr. Geoghan:

Q. Was his father also living at that time, that is, was he living with his mother? A. Yes.

Q. Is his father still living? A. No, his father died.

2362 Q. Now after that, after the father's death, when did that occur, by the way? A. That was about February 1940.

Q. 1940? A. Yes.

Q. Well, after that where did he live? A. Where did he live?

Q. Yes. A. He lived at the same place for a short while.

Q. With his mother? A. Yes, and then his sister came and lived with them; his married

2363 sister.

Q. Talk up loud, please. A. His married sister came to live with them, from the Bronx.

Q. Yes? A. And he lived with them for a while.

Q. His married sister? A. Yes.

Q. What is her name? A. Loggia.

Q. Loggia? A. Yes, sir.

Q. And where did she live, when Joe lived with her? A. On West 8th Street.

Q. In Brooklyn? A. Yes.

Q. At the same address where his mother

2364 lived? A. Yes.

Q. By the way, do you know that street address? The house address, I mean? A. I am not sure; I am not sure.

Q. Did you ever visit there? A. Yes, but I don't remember the number.

Q. Is it near the corner of Avenue U or in the middle of the block? A. In the middle of the block.

Q. In the middle of the block? A. Yes.

Q. And so then we have in the year 1940, Joe living with his married sister and his mother on West 8th Street? A. Yes.

Q. That is correct? A. Yes.

2365

Q. When were you and Joe engaged to be married? A. That was a year after we met; that was the following June.

Q. What year? A. That would be 1940.

Q. Now after your engagement, was there any kind of an arrangement made with respect to where Joe shall live or eat, or anything like that? A. Yes.

Q. Will you tell the jury about that. A. He was to eat at my house.

2366

The Court: I cannot hear you.

The Witness: He was to have dinner at my house until we were married. Since we were engaged we had that arrangement.

Q. That would be from June 1940, when you were engaged? A. Yes.

Q. Until you were married? A. Yes.

Q. When were you married? A. April 1941.

Q. So that as I understand it, Joe came to your house for dinner every night from June 1940 until you were actually married in April 1941? A. Yes.

2367

Q. What is the exact date in April? A. The 20th.

Q. And where did you and he continue to live after you were married? A. At the same place.

Q. What time did he arrive home at night? A. Joe?

Q. Yes. A. About six.

Q. Six o'clock? A. Yes.

Q. And was that the regular habit? A. Yes.

The Court: May I inquire at this time,

Mr. Geoghan, where 2118 Ocean Parkway is?

Mr. Geoghan: I was going to come to that, but you may ask.

The Witness: That is near Avenue U.

By the Court:

Q. Is that also near Avenue U? A. Yes.

Q. How far is Avenue U from Coney Island itself? How long would it take you to go in an 2369 automobile from Avenue U along Ocean Parkway into Coney Island, to the beginning of Coney Island where, for example, the car-track runs there? A. You mean on Ocean Parkway?

Q. Where a turn is made into Surf Avenue? How far is that from Avenue U with an automobile? A. About fifteen minutes, I suppose.

Q. As much as that? A. I imagine so.

The Court: Proceed.

By Mr. Geoghan:

2370

Q. Now during the time that Joe ate his evening meal at your house from the time that you were engaged, did he give you any money, I mean, from his earnings? A. Oh, yes.

Q. Did you save that? A. Yes, sir.

Q. That was to prepare for your wedding and so forth? A. Yes.

Q. And he did that regularly? A. Yes.

Q. He did not sleep at your house? A. No.

Q. He went home to his own house? A. Yes.

Q. So Mrs. Indovino, in order to clear up a

point, I understand you were engaged in June 1940? A. Yes.

Q. Was it from that time or a little later, or sometime later, that this custom of Joe taking his evening meal at your house began? A. Well, it may have been about two or three months later, the most.

Q. Two or three months? A. The most.

Q. Say in the fall of that year? A. Yes.

Q. That is when it began? A. Yes.

Q. The fall of 1940? A. Yes, sir. 2372

Q. And then continued right through? A. Yes, sir.

Q. Until the date of your marriage? A. Yes.

Q. Which was April 20th? A. Yes.

Q. 1941? A. Yes, sir, 1941.

Q. And of course, from that time until the present time? A. Yes.

By the Court:

Q. Every single night? A. Yes, every single night.

Q. Without one exception? A. No. 2373

Q. Do you understand what I have asked you, Madam? A. Yes.

Q. He was there every single night and he did not miss once? A. Not once.

The Court: All right; proceed.

By Mr. Geoghan:

Q. Now Mrs. Indovino, do you recall the night of February 15, 1941? A. Yes, I do.

Q. How do you fix that particular date in your mind? How do you know that date? A. Well, because of this wedding that took place the following day.

Q. Whose wedding? A. She is a niece of a cousin of mine.

Q. And her wedding was supposed to take place the following day? A. Yes, sir.

Q. Did you attend that wedding? A. Just the ceremony.

2375 Q. What? A. Just the ceremony.

Q. That is, the church ceremony? A. Yes.

Q. You did not go to the reception? A. No.

Q. Did Joe attend it with you? A. Yes, he did.

Q. Do you remember the names of the people who were married on that following day? A. Yes.

Q. What are they? A. Carmela Pellechia.

Q. And who else? A. And Louis Cantoni.

Q. Cantoni? A. Yes.

Q. I show you this paper and ask you whether this is a form of an invitation you received for

2376 that wedding? A. Yes.

Mr. Geoghan: I offer that in evidence.

Mr. McGough: That is objected it.

The Court: Let me see that, please.

(The paper was handed to the Court.)

The Court: This is for Sunday evening, February 16th?

The Witness: Yes.

The Court: What bearing has that on it?

Mr. Geoghan: Why, that shows how she fixes the date of February 15th.

The Court: Even February 15th; what bearing has that got in this case?

Mr. Geoghan: That is the day after—

The Court: Here is my point, Mr. Geoghan. Let us assume for the sake of argument that this man, your client, was at this lady's house the whole night of February 15th. Let us assume that to be so. There is no question about it, that they have an ironclad alibi for February 15th. What bearing has that on this case? 2378

Mr. Geoghan: It has all the bearing, I contend.

Mr. McGough: We do not contend he was there at the time of the commission of the crime.

The Court: You do not contend that he was there at the scene of the killing?

Mr. McGough: I do not contend that.

The Court: There is no evidence of that, and no claim of that either.

Mr. McGough: We make no claim as to that either. 2379

Mr. Geoghan: It makes this difference; that there is testimony here that he was there that night, and irrespective of the contention of the People that he was not at the scene of the crime, we say he was not there, and I want to show, and I want the jury to examine into the credibility of this witness, that he was there continuously.

The Court: In other words, you want to show he was there February 15th?

Mr. Geoghan: I mean to say, every day.

The Court: If I understand correctly, you want to prove that he was at this girl's home on February 15th, and was there that night.

Mr. Geoghan: That is right, as well as the other nights that she has testified to.

The Court: She said he was there every night from the fall of 1940 until the time they were married, and he did not even miss one single night; not one.

Mr. Geoghan: That is right.

The Court: That is what she testified to.

Mr. Geoghan: That is right; I heard it.

The Court: You want to prove he was there on February 15th?

Mr. Geoghan: Exactly.

The Court: Proceed.

By Mr. Geoghan:

Q. What time did he arrive there that night? A. The usual time, about six.

Q. Had dinner with you? A. Yes, sir.

Q. And how long did he remain? A. Well, all evening.

Q. Until when? A. Oh, about 1:30, 20 of 2.

By the Court:

Q. Are you speaking of every night? A. No, this one particular night.

By Mr. Geoghan:

Q. This was Saturday night, wasn't it? A. Yes, sir.

Q. Did he work on Saturdays? A. No, he did not.

Q. *Did you see him* go home on that evening? A. Yes.

Q. How did he go home? A. He took the bus.

Q. Where does the bus stop? A. Across the street from my house. 2384

Q. Where? A. On the corner of Avenue U and Ocean Parkway.

Q. How near is that to your house? A. Across the street: I can see it.

Q. You could see the bus from your house? A. Yes.

Q. What time did the bus leave? A. Oh, it must have been about 20 of 2; 1:30 or 20 of 2.

Q. Was that the last bus? A. Yes.

Q. He stayed there as long as he could? A. Yes.

Q. Do you know Mrs. Ambrosio? A. Yes. 2385

Q. Who is she? A. My cousin.

Q. Your sister? A. No, a cousin.

Q. Where did she live in the month of February 1941? A. Right next door to me.

Q. 2120? A. 2120.

Q. And yours was 2118? A. 2118.

Q. Ocean Parkway? A. Yes, sir.

Q. And do you know a Mrs. Lanzaletta? A. Yes.

Q. Is she related to you in any way? A. No, not to me, to my cousin.

Q. Did you see either one of these two ladies on the night of February 15, 1941? A. Yes.

Q. What time? A. Well, the first time we saw them was a little after 8. They were on their way to rehearsal and then when they came, that was some time after midnight.

Q. How much money on an average per week did Joe give to you from the time you were engaged until the time you were married? A. Well, that all depended on how much he earned.

2387 Q. Well, give the jury some idea. A. Well, sometimes he would give me $20; sometimes $15.

Q. $20, and sometimes $15? A. $20 and $25.

Q. Over what period, a month or a year? A. No, a week.

Q. Every week? A. Yes.

Q. And you saved for him and yourself? A. Yes.

Q. And did that continue? A. Yes.

Q. From June 1940 until you were married in April 1941? A. Yes.

Q. And of course thereafter since you were

2388 married? A. Yes.

Q. Do you recall that February 15, 1941, was Saturday? Do you not? A. Yes.

Q. Now with particular attention to that week, the week of February 10th to February 15th, would you say that Joe was home every night at 6 o'clock for dinner; that is, to your house? A. Yes, he was.

Q. You are sure of that? A. I am positive.

Q. And what about the nights between September 15th to September 30th, 1941? A. He was home—

Q. Pardon me; February 15th and February 28th, 1941? A. He was home.

Q. The same habit prevailed and he was home at 6 o'clock? A. Yes.

Q. For dinner? A. Yes.

Q. What time did he leave on those occasions to go home, I mean, except Saturdays? A. Well, about 11 or 11:30.

By the Court:

2390

Q. Every single night? A. Yes, sir.

By Mr. Geoghan:

Q. Did you and he ever go to Loew's Coney Island Theatre? A. Yes.

Q. How many times? A. Well, about two or three times the most.

Q. Two or three times? A. Yes.

Q. At the most? A. Yes.

Q. You were with him? A. Yes; sure.

Q. Do you remember when Joe was arrested? 2391
A. Yes, sir.

Q. In this case? A. Yes.

Q. When was that? A. That was October 24th.

Q. Of this last year, 1942? A. Yes.

Q. How long before that time were you and Joe at Loew's Coney Island Theater? A. That same week.

Q. That same week? A. Yes.

Q. Do you remember the picture you saw there? A. Yes, I did.

2392 Q. What was it? A. "Somewhere I Will Find You."

By the Court:

Q. What was the name of it? A. "Somewhere I Will Find You."

By Mr. Geoghan:

2393 Q. By the way, on February 15, 1941, who was in your house besides yourself? A. My mother and father and my brother, who is a Lieutenant in the Army.

Q. What is his name? A. John Scurra.

Q. Where is he? A. He is a Lieutenant; he is in Nebraska.

Q. In Nebraska? A. Yes.

Q. Doing what? A. He is at Headquarters. I don't know exactly what he is doing but he is at Headquarters.

Q. In the Army? A. Yes, sir.

2394 Q. He is not here in New York? A. No, he is not.

Q. Now from the time that you and Joe were married up until the date of his arrest, has he been a good steady industrious husband? A. Oh, definitely he has.

Q. Treated you well? A. Yes.

Q. Brought his money home to you? A. He has.

Q. And when he went out, he went out with you? A. Yes.

Q. Do you know where he was working at

the time of his arrest? A. Yes, with the Lacomastic Corporation.

Q. How much did he make a week there? A. Well, his salary would vary.

Q. Talk up loud. A. About $60 or $70 or $80 a week; sometimes $90.

Q. Depending on his overtime? A. How he used to work.

Q. And he brought his money home to you? A. Yes.

2396

Mr. Geoghan: Your witness.

Cross-examination by Mr. McGough:

Q. He was only working there a few months, is that right? A. No, he was working since March of last year.

Q. Well, from March to October, six months? A. No, it is more than six from March—he started the beginning of March.

Q. And he worked from March up to the time he was arrested? A. Yes.

2397

Q. Now during this period of time, when Joe was having dinner and giving you his money, were you working, too? A. No, I was not.

Q. And of course when he gave you these sums of $25, $20 and $15 every week, I assume you deposited it in a bank? A. No.

Q. For the purpose of your marriage? A. No, I did not. I gave it to my mother and she was taking care of that.

Q. I cannot hear you. A. I would give it to my mother.

Q. And your mother would deposit in some bank? A. No, she would hold it for me.

Q. She would hold it at home? A. Yes, held it at home.

Q. You were married in April of 1941? A. Yes, sir.

Q. Did you set up housekeeping for yourselves? A. No, we lived with my mother and father.

Q. Did you have occasion to purchase any furniture? A. Just our bedroom.

Q. And you went to your mother, and what-
2399 ever money that she saved up, your mother turned over to you and Joe at that time? A. Yes.

Q. How much money was that, Mrs. Indovino? A. Well, that was about $200.

Q. $200? A. Yes.

Q. Did you go out and purchase the bedroom suite by yourselves? A. Yes.

Q. Where did you buy that bedroom suite? A. At the Roman Furniture Company.

Q. And the address, please? A. I am not sure about the address.

2400 Q. Keep your voice up. A. I think but I am not sure; it may be on Meserole Street. I am not sure about the address.

Q. And the name of it was the Roman? A. The Roman.

Q. The Roman what? A. The Roman Furniture Company.

Q. A friend of yours owned the company? A. No.

Q. Now at the time that you became engaged, where was Joe working? A. At the Star Shoulder Pad.

Q. Where? A. At the Shoulder Pad Company.

Q. Do you know the name of the company? A. I think it was the Star.

Q. Is that the one that his sister Fannie is part owner of? A. I would not know if she is part owner.

Q. Do you know Fannie Brigandi? A. Yes, I do know her.

Q. Wasn't she part owner of the American Coat Pad Company in 1941? A. I don't know 2402
if she is part owner.

Q. You never knew that? A. No.

Q. Well, now, do you recall Joe being laid off from April 10th until June in that year 1940? A. I don't know. I know he was for a very short time.

Q. Do you remember being— A. I would not know just when.

Q. He was away from work for a period of several months in the late spring in that year, isn't that right? A. I would not say several months.

Q. Well, do you recall whether it was from 2403
April 10th until June 1940? A. No, I don't know exactly. All I know he was laid off for a short time.

Q. And then again in the fall, he was laid off for another month? Do you remember that? A. I don't.

Q. Didn't he ever tell you that? A. I know he was laid off but I would not remember exactly when.

Q. Now during the periods that he was not working at the American Coat Pad Company,

2404 do you know where he was spending his time? A. Everytime he did not work, he was with me; that was evenings.

Q. In any event work up there was so scarce that Joe finally went into business for himself, isn't that correct? A. Well, it was scarce on and off but I mean he averaged a pretty good salary.

Q. Anyway he went into the cheese business for himself a little time, didn't he? A. Yes, sir.

2405 Q. He opened a cheese store? A. Yes.

Q. So he gave up running a sewing machine for that purpose? A. Yes.

Q. And the cheese store only ran for about how long? A. Oh, I should say about a few months; a few months I guess.

Q. Didn't it run for three weeks at 2164 East 5th Street? A. Yes, sir.

Q. And then he closed the cheese store and then he went back to the Shoulder Pad Company? A. But he continued with the business.

Q. Do you remember that? A. Yes.

2406 Q. And during the time he was with the Shoulder Pad Company, he never told you that his sister Fannie was part owner, is that right?

Mr. Geoghan: I object to the question. There is no evidence here to that effect. There was a denial.

Mr. McGough: I have the right to inquire.

The Court: He is asking her whether the defendant ever told her that. Objection overruled.

Mr. Geoghan: Exception. I object to the form of the question because it as-

sumes that she was. The only question is whether he told her. That is why I object to it.

The Witness: I don't think he knew himself.

Q. You don't think he knew that Fannie was part owner? A. No.

Q. Did Fannie work up there at all? Was she around the place? A. She worked up there.

Q. Were you ever at the Tilyou Theater in 2408
Coney Island with Joe Indovino? A. I may have been. It is so seldom that I went to Coney Island.

Q. Did you ever go to Coney Island with him to a restaurant known as the S. & H. Restaurant on Stillwell Avenue? A. No, never.

Q. Were you ever in a restaurant with Joe the Tiger next to the Coney Island Theatre known as the Cosmo Restaurant?

Mr. Geoghan: We object to it.

The Court: I don't know what the 240
District Attorney has in mind. Proceed; objection overruled.

Mr. Geoghan: Exception.

The Witness: No, I don't remember.

By Mr. McGough:

Q. Did Joe at any time ever tell you about either one of those restaurants? A. No.

Q. This is the first time you have heard them? A. Well, I have seen them as I passed in the car. I have seen the Cosmo.

2410 Q. Were you with Joe when you saw them from the car? A. I don't remember who I was with.

Q. You don't know where they are, do you? A. I would not know other than just that it is so conspicuous with a sign that I could not help noticing it.

Q. Do you have a bank account at the present time? A. No, I do not.

Q. When is the last time you had a bank
2411 account? A. We did not have a bank account.

Q. You have never had one yourself? A. No.

Q. Do you know what bank your parents deposited their funds in? A. No, I do not.

Q. Did Joe ever have any bank account? A. Not that I know of.

Q. Are you sure? A. Yes.

Q. Can you tell me, Mrs. Indovino, the name of Joe's parole agent or officer? A. Yes.

Q. What is his name? A. Mr. Rist.

Q. Mr. Rist? A. Yes.

Q. Don't you remember Mr. Rist insisting on
2412 seeing Joe's bank book? A. Yes, but we told him the truth that my mother was holding the money.

Q. Didn't Mr. Rist insist that Joe open his bank account in his own name? A. No ,not that I know of.

Q. Did you ever see a bank book with Joe? A. No.

Q. Now you told Mr. Geoghan or you told the Court and jury, in answer to Mr. Geoghan, that you became engaged in June 1940? A. Yes.

Q. Is that right? A. Yes.

Q. By being engaged, I assume he gave you a ring? A. Yes.

Q. Did you go to the jeweler's to take the ring out? A. Yes.

Q. And what was the name of the jeweler and where is he located? A. I don't remember that.

Q. What? A. I can't remember that.

Q. You don't know where your ring was bought? A. Your Honor, may I say something—

The Court: Do not talk to me; answer 2414
the District Attorney's question.

The Witness: I cannot remember.

The Court: He is asking whether you remember where you bought the ring.

Mr. Geoghan: I object to the Court's manner to the witness, as being hostile, and containing a wrong impression to the jury.

The Court: The Court is not hostile at all. The Court is asking the witness to answer the District Attorney's question, which in the Court's opinion is a very 2415
clear question. The witness turned to the Court and wanted to say something to the Court. The Court now directs the witness to answer the District Attorney's question.

Mr. Geoghan: I except.

The Court: Counselor may have an objection and the objection is overruled, and he has an exception.

Mr. Geoghan: Exception.

The Court: Proceed.

The Witness: I don't remember.

By Mr. McGough:

Q. Now you told us that on the night of February 15th, Joe came each time at six and left about 1:20 or 2 a. m., is that right? A. No, 1:30 to 20 of 2.

Q. 1:30 or 1:40 a. m.? A. Yes, that was the last bus.

Q. And that was the usual time he left every night? A. Not every night; on Saturday.

2417 Q. Was that an unusual hour for him to leave? A. On Saturdays, he left that time.

Q. Saturdays, he left later? A. Yes.

Q. Other nights, he left different times? A. Well, about 11; 11:30.

Q. Now you say he did not work on Saturday, is that right? A. No, he did not.

Q. So that Friday night, he left at what hour as a rule? A. Well, it all depended. Sometimes he would leave about 11; 11:30; and sometimes later.

Q. Sometimes 1 and sometimes 2? A. No, he always made the last bus.

2418 Q. That was about 20 of 2? A. Yes, unless in the summertime he would walk home, it would be later.

Q. Now during the times when he was not working, would he always leave about the last bus? A. Yes.

Q. Now you were married in April, I think April 20, 1941? A. Yes.

Q. And at that time you were given a wedding ring? A. Yes.

Q. Where was the wedding ring bought? A. I don't remember that.

2419

Q. You cannot tell a thing about the wedding ring? A. I don't remember.

By the Court:

Q. It is fair to ask; were you present when it was bought? A. No, I was not.

By Mr. McGough:

2420

Q. Did Joe show you the ring before it was given you in church? A. Oh, yes.

Q. And did it come in a box? A. Yes.

Q. One of those boxes that holds a ring standing up? A. Yes.

Q. And you admired it? A. Yes.

Q. Tried it on? A. There was not much to admire.

Q. And did you see the name of the jeweler and the address on the box? A. No.

Q. Have you got the box home? A. I do not have it.

2421

Q. You never said anything to Joe about how nice it was or where it came from? A. I was not interested in the ring.

Q. You were not interested in the ring? A. In the ring, no.

Q. Were you interested in the wedding ring? A. No.

By the Court:

Q. It is also fair to ask if you were present when the engagement ring was bought? A. I was.

Q. You were? A. Yes.

2422 *Celia Indovino—For Deft. Indovino—Redirect*

Q. But you don't remember where it was bought? A. No.

By Mr. McGough:

Q. Was it in Brooklyn or in New York? A. New York.

Q. Was it down town or up town? A. Somewhere around Canal Street; I am not sure.

Q. Canal, near where? A. I don't know. I
2423 am not familiar with those parts.

Mr. Geoghan: I object to this line of testimony. I do not see what the significance of it is.

The Court: Objection sustained.

Mr. Geoghan: What difference does it make?

The Court: Objection sustained.

Redirect examination by Mr. Geoghan:

Q. Tell the Court and jury where you were
2424 married, where you and Joe were married.

Mr. McGough: I object.

The Court: Objection sustained.

Mr. Geoghan: There was some question about it. He is talking about the wedding ring.

The Court: Objection sustained.

Mr. Geoghan: Exception; that is all.

By the Court:

Q. I just want to know this. Did Joe have any boy friends at all? A. Yes.

Q. Did he have boy friends while you were engaged to him? A. Yes.

Q. Before you married him? A. Yes.

The Court: All right, step down.

By Mr. Geoghan:

Q. Just a moment; tell the Court and jury the names of some of his boy friends.

2426

Mr. McGough: That is objected to.

The Court: Objection sustained.

Mr. Geoghan: You brought it out yourself.

The Court: I just wanted to know if he had any boy friends.

Mr. Geoghan: That is a significant question.

The Court: No, no; but she may tell us the names.

By Mr. Geoghan:

2427

Q. Tell us who the boy friends were. A. Joe Luria, Peter Luria, John Pasquale; that is about all.

Q. They were his closest friends? A. Yes, sir.

Q. Where did they live? A. Around his section.

Q. In Brooklyn? A. Yes.

Q. They did not live around New York? A. No.

Mr. Geoghan: That is all.

2428 *Celia Indovino—For Deft. Indovino—Recross*

Recross-examination by Mr. McGough:

Q. Did you know he had a friend named Foxy? A. No.

Q. Did you know he had a friend named Ebbie? A. No.

Q. Never heard those names, did you? A. No.

Q. You are sure about that? A. Positive.

Q. In other words, what boy friends he had
2429 on the job in New York, you would not know about?

Mr. Geoghan: I object to that question.

The Court: Objection sustained.

Mr. McGough: That is all.

By Mr. Geoghan:

Q. Did he ever have a friend by the name of Yellin, or did he ever speak about him? A. No.

Q. Or a man by the name of Kovner? A. No.

2430 Q. Or a man by the name of Beitler? A. No.

Q. Did you ever hear any of those names mentioned by him? A. No.

Q. Or Rudish? A. No.

Q. Do you know any of these two men here, sitting with your husband? A. Well, I have seen Rudish when I went to visit my husband.

Q. Where did you see him? A. In Raymond Street.

Q. Now Spielfogel; do you know a man by the name of Spielfogel? A. No.

Q. Ever hear Joe talk about him? A. No.

2431

Mr. Geoghan: That is all. I still offer this in evidence.

The Court: You may mark it.

(Paper received and marked Defendants' Exhibit 1.)

Mr. Geoghan: Fannie Brigandi.

The Court: Is this also testimony with reference to that particular night?

Mr. Geoghan: He has just brought out that she was the owner of this business.

2432

The Court: All right.

FANNIE BRIGANDI, residing at 1935 West 7th Street, Brooklyn, N. Y., called as a witness in behalf of the defendant Indovino, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. Geoghan:

2433

Q. Mrs. Brigandi, are you related to Joe Indovino? A. Yes.

Q. What relation? A. My brother.

Q. And you are the wife of Mr. Brigandi that just testified here this morning? A. Yes.

Q. Are you an owner or part owner of the Star Shoulder Pad Company? A. No, sir.

Q. Or the ownership of any company like that? A. No, never.

Q. Do you work there? A. Yes.

Q. That is all? A. That is all.

Mr. Geoghan: That is all.

2434 *Fannie Brigandi—For Deft. Indovino—Cross*

Cross-examination by Mr. McGough:

Q. Before it was known as the Star, was it known as the American Coat Pad Company? A. No, the Three Stars.

Q. Weren't you ever connected with the American Coat Pad Company located at 635 Sixth Avenue, Manhattan? A. I never worked there.

Q. You never worked there? A. No, 635 Sixth
2435 Avenue, I worked, but not for the New York Pad Company.

Q. I asked you, was it the American Coat Pad Company? A. No, the Three Stars.

Q. Well, the name was changed once; do you remember that? A. The Star now. First it was Three Stars and now it is the Star Pad Company.

Q. And what was it before the Star? A. The Three Stars.

Q. And before the Three Stars, what was the name of it? A. There was never a New York Pad, never.

2436 Q. Do you remember when your brother came out of Elmira? A. Yes.

Q. Do you remember the State Parole Board writing a letter to you at 635 Sixth Avenue, asking you about giving employment to Joseph?

Mr. Geoghan: I object to this.
The Court: Objection overruled.
Mr. Geoghan: Exception.
The Witness: No.

Q. You don't remember that?

Mr. Geoghan: From this point on, your Honor, I claim that the District Attorney is making this witness his own witness, and he is bound by her answers.

The Court: We shall see. Proceed.

By Mr. McGough:

Q. Now he came out on February 3, 1939, is that right? A. I guess so.

Q. Where were you working at that time? A. 2438
In the Three Stars.

Q. What address, please? A. 635 Sixth Avenue.

Q. And what was the nature of your work? A. What was that?

Q. What did you do there? A. An operator.

Q. And did you have some money invested in that company at that time? A. No, never.

Q. Was your husband working there with you? A. Yes.

Q. And who was the owner at that time? A. Charlie Wiener.

Q. He is the owner of the Star Company now? 2439
A. Yes.

Q. Is that right? A. Yes.

Q. Did you ever tell the Parole Board in February of 1939 that you were Indovino's sister and you were part owner of the American Coat Pad Company, at 635 Sixth Avenue?

Mr. Geoghan: That is objected to.

The Court: Objection overruled.

Mr. Geoghan: Exception.

The Witness: No.

The Court: She said, "No".

2440 By Mr. McGough:

Q. Joseph did not work very steady after that, did he? He only worked a week or a month? A. He used to come in and sometimes it was slow. He used to come into the place and he used to go home if there was no work.

Q. Do you remember him working there February until April 10th and then being laid off? A. I don't remember that.

2441 Q. Do you remember him being laid off from April 10th?

Mr. Geoghan: I object to the form of the question.

The Court: Objection sustained.

Mr. McGough: I will withdraw the question and will reframe it.

The Court: Proceed.

By Mr. McGough:

2442 Q. Was he laid off from April 10th to June 1940, if you remember?

Mr. Geoghan: If she knows.

By Mr. McGough:

Q. If she knows. A. I don't quite remember. I know we were laid off sometimes, but I don't remember the date.

Mr. McGough: That is all.

Mr. Geoghan: Mrs. Lanzaletta, please.

The Court: Is this about February 15th?

Mr. Geoghan: Yes, it is.

The Court: I am not going to permit it.

Mr. Geoghan: I will present it.

The Court: Do you concede that he was in this woman's place on February 15th?

Mr. McGough: I will concede that.

The Court: You do not challenge that in anyway?

Mr. McGough: No, sir. 2444

Mr. Geoghan: All right, then, will the District Attorney concede on the record that if I called Mrs. Lanzaletta and Mrs. Ambrosio, they would testify that they saw the defendant Joseph Indovino at the Scurra home next door to the Ambrosio home on Ocean Parkway near Avenue U at 8 o'clock on February 15, 1941, and again at or about midnight of that same day, and over until about one o'clock the following morning.

Mr. McGough: I will make that concession; yes. 2445

Mr. Geoghan: Then I won't take up the time of the Court.

The Court: The point of it is, Mr. Geoghan, that the District Attorney does not claim that Indovino was at the scene of this crime at the time it was committed. The claim, as I understand it here is that he was the tipster, and that is all; not that he had anything to do with the actual commission of the crime.

2446 *Colloquy*

Mr. Geoghan: That is the claim of the People.

The Court: That is the claim. However, where he was on February 15th is not of real importance except that it is part of the general picture of the contention of the defendant that he invariably stayed at his sweetheart's home.

Mr. Geoghan: All right, with that concession I am satisfied. Will your Honor indulge with me for a moment?

2447

The Court: Yes.

Mr. Geoghan: If your Honor pleases, I had two or three witnesses, who would have naturally testified along the lines now covered by the concession. I probably have one more witness but I would ask your Honor for the same courtesy you gave the District Attorney, to let us adjourn at this time and I will finish up Monday morning.

The Court: A witness as to what? In what respect?

2448

Mr. Geoghan: Well, I do not want to disclose it for the record.

The Court: The District Attorney disclosed the nature of the testimony he intended to offer after the close of the People's case; not the details of it, but in reference to what he would offer.

Mr. Geoghan: I want to determine in my own mind whether or not I would present that testimony. I cannot do it at this moment.

The Court: You want to think over whether you will call a witness?

Mr. Geoghan: Exactly, and then put the defendant on the stand.

The Court: Put your defendant on the stand now.

Mr. Geoghan: I do not want to do that.

The Court: Proceed.

Mr. Geoghan: I ask your Honor to grant me the courtesy that you granted the District Attorney when he made a 2450
similar request.

The Court: Proceed, please.

Mr. Geoghan: I take exception to the fact that your Honor forces me on at this time.

The Court: Proceed with the case.

Mr. Geoghan: Rose Scura, take the stand, please.

ROSE SCURA, residing at 2118 Ocean Park- 2451
way, Brooklyn, N. Y., called as a witness for the defendant Indovino, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. Geoghan:

Q. Mrs. Scura, are you the mother-in-law of Joe Indovino? A. Yes.

Q. Do you recall when your daughter and Joe Indovino were engaged? A. I just don't remember when.

2452 Q. Do you remember the year? A. About seven or eight months prior to her getting married; I just don't remember the date.

Q. Do you know when she was married, do you not? A. I don't remember. I was sick and I am still sick.

Q. You mean you were sick at the time she was married, is that right? A. Yes, I am a diabetic.

Q. Well, do you recall Joe Indovino having
2453 meals at your home? A. Yes.

Q. How often did that occur? A. About eight or nine months prior to getting married. He used to come every night.

Q. What time? A. About six o'clock in the evening.

Q. Did you prepare the meals for him yourself? A. Yes.

Q. And you waited on him at the table? A. Yes.

Q. And that was every night from the time of his engagement? A. Yes.

Q. Until he was married? A. Yes.
2454

Q. And did he and his wife, your daughter, continue to live with you after their marriage? A. Yes.

Mr. Geoghan: Your witness.

The Court: Any cross-examination?

Mr. McGough: No cross-examination.

Mr. Geoghan: Just a moment, my associate has just suggested a question to me.

The Court: Yes.

2455

By Mr. Geoghan:

Q. Do you recall your daughter, Joe's wife, giving you money to save for them? A. Yes.

Q. And that happened every week, did it not? A. Yes, yes.

Q. You turned it over to them after or right before they were married? A. Yes.

Mr. Geoghan: That is all.

Mr. McGough: That is all.

2456

Mr. Geoghan: My last witness will be the defendant.

The Court: All right.

Mr. Geoghan: I understand that you are going to adjourn at 1:30 o'clock and I would not like to have the cross-examination go from now until Monday. I think there should be the direct and cross-examination together at one time.

The Court: Proceed, please.

Mr. Geoghan: Of the defendant on the same day, and in fairness to the defendant—

2457

The Court: Proceed, please.

Mr. Geoghan: Are you going to adjourn at 1:30 then?

The Court: Proceed.

Mr. Geoghan: I make the request that this matter go over until Monday morning.

The Court: Please proceed.

Mr. Geoghan: All right; take the stand, Indovino.

2458 *Joseph Indovino—For Deft. Indovino—Direct*

JOSEPH INDOVINO, a defendant, residing at 2118 Ocean Parkway, Brooklyn, N. Y., called as a witness in his own behalf, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Mr. Geoghan: May it be noted that I made my request at ten minutes to one?

The Court: Yes.

Direct examination by Mr. Geoghan:

2459

Q. Joe, how old are you? A. 27.

Q. Are you married? A. Yes, sir.

Q. When and where were you married? A. April 20, 1941.

Q. And where? A. Our Lady of Grace, Avenue W and East 3rd Street, I believe.

Q. Any children? A. One.

Q. How old? A. I would say about 15 months now.

Q. Now Joe—

2460

Mr. McGough: Just a moment. I am going to ask your Honor to have Mr. Geoghan and the other counsel address these men as defendants or Mr. Indovino. I don't like this "Joe" and anything else business.

Mr. Carabba: I never heard of any such remark coming from a District Attorney.

Mr. McGough: Then you have heard it for the first time.

Mr. Carabba: I never heard a request

of that kind by a District Attorney in the trial of a homicide case.

Mr. McGough: Times are changing.

Mr. Carabba: It is ridiculous.

The Court: Mr. Geoghan, you may call him Joe if you wish to.

By Mr. Geoghan:

Q. Now Joe, you were convicted of the crime of robbery, weren't you? A. Yes, sir. 2462

Q. Did you go to trial or did you take a plea? A. I took the plea.

Q. And what was the plea? A. Attempted robbery in the third degree.

Q. In what court? A. County Court, Brooklyn.

Q. Of Kings County? A. Kings County.

Q. And on that you were sentenced to Elmira Reformatory, weren't you? A. Yes, sir.

Q. How long were you there? A. I believe about 19 months.

Q. And when did you leave Elmira? A. February 3, 1939.

Q. Of what year? A. 1939. 2463

Q. Now before you left Elmira, did you have a job waiting for you? A. Yes, sir.

Q. Where was that? A. Well, I don't remember the name of the firm. They made ladies' coats and I was a presser for about two or three weeks or a month.

Q. Where was it located? A. 27th Street, New York City.

Q. Do you know the name of it? A. No, sir.

2464 Q. What kind of work did you do there? A. I was a presser.

Q. Presser? A. Yes, sir.

Q. And how long did you work there? A. About three weeks to a month.

Q. And from there, where did you go to work? A. At the Star Shoulder Pad Company.

Q. That is the concern for which your brother-in-law is the foreman? A. Yes, sir.

Q. And was there any reason for your chang-

2465 ing your employment?

Mr. McGough: That is objected to.

The Witness: Yes, sir.

The Court: Objection overruled.

Q. What was the reason? A. Well, I was only getting $12 a week there and there was no chance of advancement so I asked my sister the first opening if she could get me in the place.

Q. She was working there at the time? A. That is right.

Q. And through her you got a job? A. Yes,

2466 sir.

Q. And that was finally a better job, wasn't it? A. Why, of course, in two days I could make $12, whereas at the other place I would have to work all week and there is no chance of advancement, and I would be only making $12.

Q. You did piecework there, I understand? A. Yes.

Q. You say in two days, you would make $12 where you would make that in a week in the other place? A. Yes, sir.

Q. So that I assume that your wages amounted to about $6 a day, is that so? A. Yes, sir.

Q. Was it ever any more than that? A. At times, $7 or $8.

Q. In other words, the more pieces you turned in, the better your pay? A. At first when I went to work there, I could not make that amount. I had to pick up speed.

Q. And when you became more experienced, you did? A. Yes.

2468

Q. And how long did you work for the Star Shoulder Pad Company? A. Well, from February 1939 to January 1942.

Q. And where did you go to work then? A. The State Arsenal Procurement Office, 64th Street and Second Avenue.

Q. Is that under Selective Service? A. Yes.

Q. Under Selective Service? A. Yes.

Q. That was a temporary position, was it not? A. Yes, sir.

Q. How much did you make there? A. $25 a week.

2469

Q. Did you make application for that, a written application? A. Well, I did not make out an application. A friend of mine recommended me and he was some kind of a foreman there. That is how I got the job.

Q. What kind of work did you do there? A. Classified laborer.

Q. Were you there from February 3rd to March 6th of 1942? A. Yes, sir.

Q. And why did you terminate your employment with the Selective Service? A. It was understood it was just a temporary job.

2470

Q. Was there lack of work or something like that? A. Lack of work.

Q. Never had any trouble or anything like that there? A. No.

Q. Were you discharged? A. No, sir.

Q. Except for lack of work? A. Yes.

Q. Where did you go then for employment? I will withdraw that for the moment. I show you this letter and ask you if you received that letter from the Selective Service? A. Yes, sir.

2471

Mr. Geoghan: I offer it in evidence.

The Court: This is dated March 6, 1942. What bearing has that on this case?

Mr. Geoghan: I have offered it.

The Court: I am asking you what bearing has it on this case?

Mr. Geoghan: You can read one of the paragraphs there—

The Court: What bearing has it on the case?

Mr. Geoghan: Will you mark it for identification?

2472

The Court: If you claim it has any bearing on this case, I will let you mark it.

Mr. Geoghan: Mark it for identification.

The Court: Then you withdraw your offer? Mark it for identification.

Mr. Geoghan: For the moment.

The Court: Mark it for identification.

(Paper received and marked Defendants' Exhibit D for identification.)

By Mr. Geoghan:

Q. Joe, after you left the Selective Service job, where did you go for employment? A. Lacomastic Corporation.

Q. Where is that located? A. 34 Beard Street, Brooklyn, opposite Todd Shipyards.

Q. When did you go there? A. March 16th or 11th.

Q. Of this year? A. 1942.

Q. Were you working there continuously up 2474
until the day of your arrest? A. Yes.

Q. What kind of work did you do there? A. I was hired as a sprayer's helper but at the time of my arrest I was a full-fledged sprayer.

Q. What did you make when you first went to work there? A. $50 or $60, and anywheres up to $92.

Q. What were you making when you were arrested? A. At the time of my arrest, we were slow but it was understood that we would pick up in a week or two.

Q. Was it a defense plant? A. That is right; 2475
we were expecting the ships to come in to be repaired.

Q. So you would make as high as $90 a week? A. Yes, sir.

Q. As a matter of fact—

By the Court:

Q. And you worked right up to the day of your arrest? A. In fact, I was going—

Q. Did you have any money at the time of your arrest? A. $4.

2476 *Joseph Indovino—For Deft. Indovino—Direct*

By Mr. Geoghan:

Q. As a matter of fact, at the time you were arrested, you were on your way to work? A. Yes, sir.

Q. What time was that? A. About 5:30 p. m. I was picked up.

Q. You were going to do night work? A. Yes, sir.

2477 By the Court:

Q. What I mean is, did you have any money at the time of your arrest? I do not mean any money in your pocket but did you have any other money? Did you have any money at the time of your arrest or did you have funds at the time of your arrest? A. Well, if I did, I don't think it was much.

The Court: All right; go ahead.

By Mr. Geoghan:

2478

Q. Now Joe, in the month of February 1941, where were you working? A. Star Shoulder Pad.

Q. And where were you living at that time? A. I believe it was 2067 West 8th Street. Yes, 2067 West 8th Street.

Q. With whom? A. Or 1835 West 9th Street.

Q. That is Brooklyn? A. Yes, sir.

Q. What section of Brooklyn is it? A. Gravesend, I believe.

Q. It is not Coney Island? A. No, sir; in fact, it would be closer to Bensonhurst.

Q. You lived there as I understand it with your mother and sister? A. Yes.

Q. Where did you take your evening meal during the month of February 1941? A. At my fiancee's home.

Q. Every night? A. Yes, sir.

Q. When did that custom start, when you were taking your evening meal? A. It started anywheres about nine months before I got married, eight or nine months. 2480

Q. After your engagement? A. Yes.

Q. And up to the time of your marriage? A. Yes.

Q. And then as I understand it, you have continued to live with your wife's people, Mr. and Mrs. Scura, since you are married? A. Yes, sir.

Q. Do you know the defendant Rudish? A. I have known him for the past eight months, ever since the arrest.

Q. Prior to the time you were arrested in this case, did you ever know Rudish? A. No, sir. 2481

Q. Ever see him any place? A. No, sir.

Q. Ever talk to him? A. No, sir.

Q. Didn't know he existed? A. That is right.

Q. How about the defendant Malinsky? A. Malinsky, I used to see him in Elmira but I never spoke to him.

Q. Did you know his name there? A. Well, I didn't know his name at the time; that is, they used to call him "Jew Boy", but then I had forgotten it until Mr. Heffernan asked me

if that was his name "Jew Boy", so I said they called him that up there but I am not sure.

Q. You remember Mr. Heffernan or some of the detectives asking you before you saw this defendant whether you knew Malinsky or you knew a man by the name of Malinsky? A. That is right.

Q. What did you say? A. No.

Q. Then when they brought Malinsky in and showed him to you, what did you say? A. I was
2483 in the bedroom and he was sitting in the living room. They said, "Do you know the man in the next room". I said "Yes, I do." They said, "Where do you know him from?" I said, "I saw him in Elmira."

Q. And that is the only place you know him from? A. Yes, sir.

Q. Now Joe, on February 10th, Monday of the week of February 15th, did you go to work? A. Yes.

Q. You were working then at the Star Shoulder Pad Company? A. Yes, I worked almost
2484 every day.

Q. Did you work every day that week? A. Yes, sir.

Q. Except Saturday, of course? A. That is right.

Q. It was a five-day job? A. Yes.

Q. And what were your hours there? A. From 8 to 4:30.

Q. And at 4:30 on February 10th, 11th, 12th, if you worked on Lincoln's Birthday, and the 13th, when you left your work, where did you go, directly, I mean? A. I would wash up and

dress up and head straight for my fiancee's home.

Q. Did you stop any place on the East Side? A. I don't even know what the East Side looks like.

Q. Did you ever go over around there? A. As far as Third Avenue or Second Avenue to do some shopping; that is about all.

Q. Did you ever make it a place where you would meet your friends? A. No, sir.

Q. The East Side of New York? A. I have 2486
no friends there.

Q. How would you go home from your place of business? A. I took the Brighton Line to Avenue U and from there I would take a bus.

Q. And was there a station at Avenue U on the Brighton Line? A. Yes, sir.

Q. How far is that from your present wife's home? A. About eight blocks.

Q. That is the nearest station to your wife's home? A. Yes.

Q. And you would walk that distance? A. No, I would take the bus; and sometimes I would walk. 2487

Q. What time would you arrive or did you arrive during that week, the 10th, 11th, 12th, 13th and 14th of February? A. Six o'clock at the latest.

Q. What is that? A. Six o'clock at the latest.

Q. That was by regular custom, was it? A. Yes, sir.

Q. And you do remember that particular week that you went home directly and were home that night at six o'clock? A. Yes.

Q. And had your meal, your evening meal? A. Yes.

Q. Now the next day, February 15, 1941, Saturday, did you go to your fiancee's home? A. Yes, sir, sometimes in the afternoon.

Q. What time? A. I believe about 2 or 2:30.

Q. Had you been out of Brooklyn that day at all? A. No, sir.

Q. And how long did you remain at your fiancee's home on that day? A. Well, until about

2489 1:30 or a quarter of two.

Q. Did you have your dinner there? A. Yes, sir.

Q. What time? A. About six.

Q. Do you recall anybody coming into the house that night; I mean, other than members of the family? A. Yes, sir, two women. One lived next door, and her cousin.

Q. What is the cousin's name, if you know? A. Mrs. Lanzaletta.

Q. And the name of the next door neighbor? A. Mrs. Ambrosio.

Q. What time did they come in the house?

2490 A. Sometime around midnight.

Q. And how long did they remain? A. About three-quarters of an hour.

Q. And you left, you say, about 1:30? A. That is right.

Q. Was that your custom on Saturday nights to leave about that hour? A. Almost every Saturday night.

Q. Why was that? A. I would catch the last bus.

Q. No other bus after that time? A. The last bus was about 1:30 or a quarter of two.

Q. Did you go directly home? A. Yes, sir.

Q. Go to bed? A. Yes, sir.

Q. You did not go over to New York, did you? A. No, sir.

Q. And the next day, Sunday, what time did you get up? A. I would say about eleven.

Q. You went to your fiancee's home that day? A. Yes, I arrived there about 1:30 or 2 o'clock.

Q. Remained all day? A. Yes, sir.

Q. And the next day, I assume, you went to work? A. Yes, sir. 2492

Q. You saw a man by the name of David Yellin on the stand, Joe? Do you know him? A. No, sir.

Q. Did you ever know him? A. No, sir.

Q. When was the first time that you saw Dave Yellin? A. In the station house on October 26th.

Q. A few days after you were arrested? A. That is right.

Q. Who showed him to you at that time? A. Lieutenant McNaily, I believe.

Q. What did he say to you, that is, McNally, with respect to Yellin? A. Well, McNally didn't say nothing to me. He only told me to get up; that is all, and this fellow came over and pointed a finger at me and said that he knew me and once I went to New York and gave him a soft touch; told him about some place. 2493

Q. Was that the first time you ever saw Yellin in your life? A. Yes.

Q. An entire stranger? A. Yes.

Q. Do you remember a man by the name of Spielfogel, that they called Slip, testifying in

this case? A. Yes, sir. He was also in Elmira about the same time that I was there.

Q. Did you know him? A. Not very good; just used to see him in the place; say "hello" to him once in a while.

Q. In other words, he was not the same as Yellin. You knew who he was? A. Yes.

Q. But you were not friendly with him? A. No.

Q. Chummy with him or anything like that?

2495 A. No, sir.

Q. What about Sam Kovner, who also testified here? Do you know him? A. Never seen him before in my life.

Q. When was the first time you ever saw him? A. In this courtroom.

Q. When he sat in the chair that you are sitting in now? A. Yes, sir.

Q. And that is the truth? A. The God's honest truth.

Q. Do you know or did you ever know a man by the name of Abraham Beitler, who is mentioned in this indictment?

2496 A. No, sir.

Q. That name does not mean anything to you? A. No, sir.

The Court: Or Ebbie.

Q. Ebbie, the one that they referred to as Ebbie? A. I have heard of the name Ebbie up in Elmira, but I don't know who Ebbie was.

Q. You never personally met him? A. No, sir.

Q. Do you know when you were in Elmira,

what was the population there? A. Anywheres from 1300 to 1600.

Q. You did not get to know everybody in Elmira, did you? A. Of course not.

Q. I show you this picture and ask you if that resembles anybody you know? A. That photograph was shown to me before and I told the authorities I did not know him.

Q. Where was that photograph shown to you? A. A smaller one, not that.

Q. Where? A. At the station house and at 2498
the hotel.

Q. After your arrest? A. Yes.

Q. They asked you if you knew the person whose picture that was? A. Yes, sir.

Q. And you said you did not know him? A. Yes.

Q. And you don't know? A. No.

Q. Joe, on Tuesday or Wednesday of the week of February 10th, did you meet a man by the name of Abraham Beitler over in Manhattan? A. I cannot meet a person whom I don't know.

Q. Pardon me? A. No, sir. 2499

Q. Did you and Beitler ever have a conversation in which you told him about a good tip down in Coney Island? A. I don't know Beitler.

Q. A trick, or anything of that kind? A. I don't know him.

Q. You don't know him? A. No.

Q I must ask you these questions. Did you ever say to Beitler, "There is an easy touch in Coney Island and the cop won't give any

bother", or words in substance to that effect? A. No, sir.

Q. Do you ever recall being in the company of Beitler on Tuesday or Wednesday of the week of February 10th, or any other day during that week, when this man by the name of Dave Yellin joined you two? A. No, sir, I don't know either one of them.

Q. Did Beitler ever in your presence say to Yellin, "This fellow says he has a good job in
2501 Coney Island", or words in substance to that effect? A. I don't know any of them.

Q. Did you ever say that? A. No, sir.

Q. I mean, did you ever hear Beitler say that to Yellin? A. No, sir.

Q. Did it ever happen? A. No, sir.

Q. Were you ever in the vicinity of Attorney and Broome Street over in New York? A. No, sir.

Q. You know where those streets are? A. No, sir.

The Court: What is the answer?
2502 The Witness: No, sir.

By Mr. Geoghan:

Q. Were you born in Brooklyn? A. Yes.

Q. Lived in Brooklyn all your life? A. Yes, sir.

Q. Now five days before February 15, 1941, did you, as testified to by Kovner, or were you, as testified to by Kovner, at Attorney and Broome Streets in New York? A. No, sir.

Q. On or about February 21st or February 22nd, as testified to by Kovner, did you meet

this man Beitler, known as Ebbie, at Attorney and Broome Streets, in New York? A. No, sir.

Q. Did you on that occasion, February 21st or 22nd, 1941, ever say to Beitler, in the presence of Kovner, that you wanted money from him? A. No, sir.

Q. Or that you needed money? A. No, sir.

Q. Or words in substance to that effect? A. No, sir.

Q. Were you at that same corner, Attorney and Broome Street in New York City two days after that, namely February 24th? A. No, sir, I have never been in that vicinity. 2504

Q. Pardon me; February 23rd or 24th, were you? A. No, sir.

Q. Were you on February 27th or 28th, 1941, at about 8:30 or 9 o'clock in the evening at Broome and Attorney Streets in New York? A. No, sir.

Q. Were you ever at that place? A. No, sir.

Q. Did you ever meet Beitler or Kovner there? A. No, sir; I don't know them.

Q. You have been to Loew's Coney Island Theatre, haven't you? A. Yes, sir. 2505

Q. How many times? A. I would say about five or six times.

Q. It is the largest theater in that section, isn't it? A. Yes, sir.

Q. What moving picture theaters is over in the section where you lived at that time? A. The Mayfair Theater.

Q. Did you go to the Mayfair Theater also? A. Yes, sir.

Q. And you and your present wife visited, I

mean attended Loew's Coney Island Theater together? A. Yes.

Q. In fact, you were there shortly before your arrest, weren't you? A. I believe so.

Q. How long before? A. About a week or two; I guess; I don't remember.

Q. You heard about the Fox murder, I assume, after it happened, did you? A. Yes, I read the headlines of it; that is about all.

Q. Do you recall how long after it happened
2507 you read the headlines? A. Gee, I don't remember.

Q. It did not mean anything to you specially at that time? A. No, sir.

Q. Did you ever tip anybody off to go down to Coney Island and hold up the manager of the Loew's Coney Island Theater? A. No, sir.

Q. Do you know anything about it at all except what you read in the paper? A. That is all I know about it.

Q. And were you out of the City for a time? A. For two weeks I believe sometime last
2508 summer.

Q. Tell us when that was. A. I believe in between June and July, I guess. My outfit sent me out.

Q. June or July? A. Yes.

Q. Of what year? A. 1942.

Q. 1942? A. Yes, sir.

Q. And what city did you go to? A. Baltimore, Maryland.

Mr. McGough: I object to that.

The Court: Objection overruled.

By Mr. Geoghan:

Q. Baltimore? A. Yes, sir.

Q. What were you doing down there? A. I went out as a sprayer's helper.

Q. You were working there? A. Yes.

Q. And how long did you remain on that job? A. Two weeks, and I came back here because the draft board called for me.

Q. And then did you go back to work for the Lacomastic? A. Yes, sir. 2510

Q. Or had you been working for them? A. I had been working for them right along and this outfit sent me out there.

Q. This work in Baltimore was for the Lacomastic Corporation? A. Yes.

Q. When you finished that job, you returned? A. Yes, because of the draft board.

Q. And with that exception, you have been in the Borough of Brooklyn and the City of New York continuously since the 15th day of February 1941 right up to the present moment? A. Well, I had to be; I was on parole.

Q. You have been referred to in this trial as Tiger? A. Yes, sir. 2511

Q. Was that a nickname of yours? A. Well, it was given to me at the age of about 14.

Q. Tell the jury how you got the nickname of Tiger? A. Well, there was a song I liked that they called "Tiger Rag" at the time and I would always request that in the social clubs.

Q. Whenever you would go to a club, you would request them to play the "Tiger Rag"? A. Yes, sir.

2512

Q. So they pinned the name of Tiger on you? A. Yes.

Q. It was not because you were a ferocious fellow or anything like that? A. No, sir.

Q. As I understand it, you say you saw Malinsky and Spielfogel up in Elmira? A. Yes, sir.

Q. Did they come out before or did you come out before them? A. I came out before them.

Q. And from the time that you came out of Elmira, did you ever see Malinsky? A. No, sir.

2513

Q. Did you ever see Spielfogel? A. No, sir.

Q. Until this case, is that it? A. Until this case.

Q. Never in their company? A. Never.

Q. At any time? A. No, sir.

Q. Joe, did you at any time aid or abet or act in concert, directly or indirectly, with Morris Malinsky and Sidney Rudish and Abraham Beitler in the holdup at Coney Island on February 15th, 1941, in which holdup or during the course of which holdup Patrolman Leon Fox was shot and killed? A. No, sir; I know absolutely nothing about this crime nor do I know the other two defendants; that is, I don't know them as friends. I only know Malinsky because of the fact that he was in Elmira at the time I was there.

2514

Q. Did you ever say to Beitler or anybody else "that you did not have to shoot the cop"? A. No, sir.

Q. Do you know the manager of Loew's Coney Island Theater? A. No, sir.

Q. Did you see him here on the stand? A. Yes, sir.

2515

Q. Do you recall ever seeing him when you went to the theater? A. No, sir.

Q. Never saw him around the theater? A. No, sir.

Q. Did you know Patrolman Fox? A. No, sir.

Q. So the only thing you know about this case, apart from what you have heard here and what has been going on during the investigation, is the headline that you read a day or so after the murder occurred? A. That is right.

2516

Mr. Geoghan: Now before he leaves the stand, Judge, I now renew my offer of this letter of March 6, 1942, as an exhibit in evidence for the purpose of showing the conduct of this defendant after he left Elmira.

Mr. McGough: I object.

The Court: Objection sustained. A letter is not proof. You know that, Mr. Geoghan.

Mr. Geoghan: I am offering it.

2517

The Court: As a former District Attorney, you know that is not proof. That is not the way to prove the evidence.

Mr. Geoghan: It may be offered—

The Court: Objection sustained.

Mr. Geoghan: I take an exception. Your witness.

The Court: It is now 1:25 p.m., five minutes before the time that we set to adjourn, and I think it may be well to take an adjournment now that Mr. Geoghan

has completed with his direct examination.

Gentlemen of the jury, we are about to take a recess until Monday morning at ten o'clock, and I admonish you gentlemen not to discuss this case among yourselves or with any other person or persons or permit anyone to speak to you about this case in your presence or talk to you about this case. You must keep
2519 your minds open. Please do not form or express any opinion or conclusion as to the guilt or innocence of these defendants or either of them or any of them until the case is finally submitted to you for your consideration after a charge on the law by the Court. Refrain from reading anything in the newspapers concerning this case. The jury will retire and return Monday morning at ten o'clock.

(The jury retires from the courtroom.)

The Court: The defendants are remanded.

2520

Recess until 10 a.m., June 21, 1943.

2521

AFTER RECESS.

Brooklyn, N. Y., June 21, 1943.
10 a. m.

TRIAL RESUMED AND ROLL CALLED.

Mr. Geoghan: I have a few more questions to ask.

The Court: Certainly.

2522

JOSEPH INDOVINO, one of the defendants, resumes the stand, having been previously duly sworn, and testifies as follows:

Direct examination by Mr. Geoghan (continued):

Q. Joe, I understand that at one time, since you came out of Elmira, you were in business for yourself: am I right? A. Yes.

Q. When was that? A. The year of 1941.

Q. At that time were you working for the Star Shoulder-Pad Company? A. I stayed away from work for about three months. 2523

Q. Were you in business? What business was that? A. The olive oil and cheese business.

Q. At any time while you were in that olive oil and cheese business, were you also working at the Star Shoulder-Pad Company? A. After three months I went back to work and maintained a business at the same time.

Q. In other words, you were away entirely for three months, during which you were in this business? A. Yes, sir.

Q. Then you gave up the business? A. Yes.

Q. Returned to the Shoulder-Pad Company? A. Yes.

Q. After you came out of Elmira Reformatory, of course, you were on parole, were you not? A. Yes, sir.

Q. How long? A. Till May 5th, 1942.

Q. Since May 5th, 1942, up to the present time, you have not been on parole? A. No, sir.

Q. You were relieved in May, 1942? A. Yes.

Q. But in the month of February, 1941, you
2525 were on parole? A. Yes.

Q. You reported regularly to your parole officer? A. Yes.

Q. And you were careful, were you not, not to be with people of questionable character while you were on parole? A. Yes.

Q. Or to go to places of questionable character or ill repute? A. Yes, sir.

Q. Of course, if you violated parole, you would go back to prison, wouldn't you? A. Yes.

Q. You did not want that? A. No.

Q. You were arrested, as I understand, on October 24th, of last year? A. Yes, sir.
2526

Q. What day of the week was that? A. On a Saturday.

Q. At what time of the day? A. About 5:30 p.m.

Q. Where? A. On Avenue U between East 7th and East 8th Streets.

Q. How far were you from your home? A. About a block and a half away.

Q. Where were you going at that time? A. To work.

Q. After you were taken into custody you were brought where? A. I was driven around

for about two hours, then I was taken up to the Hotel Bossert.

Q. You were there for the rest of the day? A. Yes, sir; I was there until Monday afternoon.

Q. Sleep there that night? A. I got a few hours sleep.

Q. There all day the next day, Sunday, is that right? A. Yes.

Q. On Monday, until what hour? A. 3:30 p.m. 2528

Q. Then you were taken to a police station? A. To the Bath Beach station.

Q. Later on, on that day, arraigned in court, is that right? A. The following day.

Q. That is on Tuesday? A. Yes, sir.

Q. At the time that you were at the Bossert Hotel and when you were at the police station, were detectives questioning you about the Fox murder? A. Yes.

Q. Did you at any time make any admission—

The Court: Oh! Oh! 2529

Mr. McGough: Objection.

Mr. Geoghan: I have a right to ask him if he were questioned.

The Court: Go ahead, ask the question, Mr. Geoghan.

By Mr. Geoghan:

Q. Were you questioned all that time by the detectives? A. Yes.

Q. The story you told there was the story you told here on the stand? A. Yes, sir.

2530 *Joseph Indovino—For Deft. Indovino—Cross*

Cross-examination by Mr. McGough:

Q. You say you are how old now, Indovino? A. Twenty-seven.

Q. Born in this country, I take it? A. Yes, sir.

Q. What was the last school you went to, please? A. 8th grade.

Q. What was the school? A. I believe it was James A. Boody High School, Junior High School.

2531

Q. In Brooklyn? A. Yes, sir.

Q. Did you ever go to High School? A. No.

Q. How old were you when you left Grammar School? A. I believe about fifteen.

Q. You went to work? A. Yes, sir.

Q. Did you ever prepare for any trade or occupation? A. I believe I was working in a dress concern as a messenger, delivery clerk, something.

Q. How long did you hold that job? A. I don't remember.

Q. Don't remember that? A. No, sir.

2532

Q. Do you remember any job you had of any length of time up to the time you were twenty-one years of age? A. Yes, sir; I worked for Martin Uniform Company. I held on to that job for about two or three years.

Q. Martin Uniform Company is located where? A. Last thing I heard of them they were still on 22nd Street, New York.

Q. Not where you last heard of them; where did you work for them? A. On 22nd, West 22nd Street.

Q. Manhattan? A. That is right.

Q. What kind of work did you do for them? A. I was a presser.

Q. You mean by that you were pressing clothing? A. Seam presser, they made uniforms.

Q. Worked for them a couple of years; right? A. Yes.

Q. You did not know much about pressing or sewing until you hit Elmira Reformatory, isn't that right? A. No.

Q. Didn't they give you a poor rating as a tailor up in the Reformatory when you first landed there? 2534

Mr. Geoghan: I object to that question as immaterial, what rating they gave him.

The Court: I don't know. The District Attorney may have something in mind.

Mr. Geoghan: He is questioning along the lines of duration of employment; skill has nothing to do with it.

The Court: I don't know, Mr. Geoghan. We will see, and if it later turns out that the question is immaterial I will strike it out on your motion. 2535

By Mr. McGough:

Q. In other words, what I have in mind is you really received a lot of instruction and training and experience while you were at Elmira?

Mr. Geoghan: I object to that also.

The Court: Overruled.

Mr. Geoghan: Exception.

A. Whatever experience I had up there I could not make much use of.

By Mr. McGough:

Q. You mean whatever tailoring work you did at the Reformatory you could not use on the outside? A. That is right.

Q. And you were up there how long? A. 19 months.

2537 Q. Didn't you do anything else in the Reformatory besides work in the tailor shop? A. Yes; I worked on the outside gang, the power house gang.

Q. How long were you on that gang? A. About three months.

Q. Up until the time that you went into the Lacomastic job you were always a tailor or presser; isn't that right? A. I was working for the Star Shoulder-Pad Company.

Q. Doing tailoring work, pressing work; right? A. That is not pressing and that is not tailoring.

2538 Q. What is it? A. Operating—making shoulder-pads.

Q. Operating a sewing machine; right? A. That is right.

Q. That is not tailoring work? A. That is called zigzag work, I don't know if you would call it tailoring.

Q. Did you get much experience in zigzag work up in the Reformatory? A. None whatsoever.

Q. Sure about that? A. Positively.

Q. At the time you were convicted of robbery

here in Brooklyn, you were twenty-one years of age, is that right? A. Yes.

Q. Were there any other defendants in that case besides yourself? A. No, sir.

Q. In that case, I think you told Mr. Geoghan, you pleaded guilty; is that right? A. That is right.

Q. You copped a plea, as they say? A. Yes, sir.

Q. Was that in connection with a payroll?

2540

Mr. Geoghan: I object to that.

The Court: Sustained.

By Mr. McGough:

Q. Before you committed that particular crime, did you follow a girl from a bank for three or four weeks?

Mr. Geoghan: I object to that also, incompetent, irrelevant and immaterial, not within the issues in this case.

2541

The Court: Sustained.

By Mr. McGough:

Q. Now, when you did go to Elmira, you told us that you saw Malinsky up there; right? A. Yes, sir.

Q. How about Slip Spielfogel, did you see him? A. I saw him there, too.

Q. At various times you saw both of them while you were in Elmira; is that right? A. Yes, sir.

2542 Q. Did you have occasion to eat with them at the same table? A. It might have happened.

Q. Don't you remember? A. Well, the only time it did happen was at the time that I first entered Elmira Reformatory, because we were locking near each other.

Q. Were you ever in the "box" in Elmira? A. No.

Q. Do you know what that means? A. I believe that is considered as the bughouse.

2543 Q. In solitary confinement? A. Well, the guard house is what was called solitary confinement.

Q. Were you ever in the "box" at Elmira?

Mr. Geoghan: I object to the question.
The Court: Overruled.
Mr. Geoghan: Exception.

A. Yes; I believe I was in twice.

Q. You were in there twice; is that right? A. Yes, sir.

2544 Q. That was because the "gang in population" was going to give it to you; is that right?

Mr. Geoghan: I object to that.
The Court: Sustained.

By Mr. McGough:

Q. Do you know what "in population" means?

The Court: I am permitting this evidence, I take it, because you have in mind

you want to show association between this man and Spielfogel?

Mr. McGough: That is one purpose.

The Court: And Malinski. For no other reason. What his behavior up in Elmira was is entirely immaterial. I will permit you to show association, because of his denial that he knew these men except casually. That, I will permit you to go into very deeply, if you so choose. 2546

By Mr. McGough:

Q. I think I asked you before about "in population". That means when all the inmates at various times of the day meet one another in the yard or elsewhere? A. You don't get that opportunity in Elmira.

Q. What? A. That opportunity is not given to you in Elmira.

Q. You were locked in all day in Elmira, were you not? A. No, sir, you work. 2547

Q. Will you tell me, if you are not in solitary or in the "box" then you are "in population;" right? A. Yes.

Q. When you are "in population" you can move around and see some of the other inmates? A. No, sir. Especially in the shop where I worked, we were not allowed to go out unless we had a special purpose.

Q. Did you ever have movies up there? A. Yes.

Q. Didn't you all sit down in the auditorium? A. Yes; but you cannot jump out of line; you

2548 *Joseph Indovino—For Deft. Indovino—Cross*

have to go to the movies in rotation, one after another.

Q. That is you can talk to the fellow alongside of you in the movies? A. Yes.

Q. On the way to the shop you can talk to the fellows in front or in back of you? A. Yes; if you wish to.

Q. Was there any reason why you were in the "box" twice up there? A. What do you mean by that?

2549

Mr. Geoghan: I object to that question.

The Court: Sustained.

By Mr. McGough:

Q. You told us that you might have heard of a man named "Ebbie" at Elmira?

The Court: Mr. District Attorney, I will permit you to ask this witness any pointed question which in any wise affects his credibility; whether the occurrence transpired in Elmira or whether it transpired in any other place is of no consequence. That, I will permit you to do if it bears on his credibility—any vicious or immoral act; but merely to ask him if he was in the "box"—

2550

Mr. McGough: Judge, I am going—

The Court: (Continuing)—is improper.

Mr. McGough: Your Honor knows what I have in mind, and I submit it is

not improper if it leads up to what I intend to ask.

The Court: You may proceed.

(Last question read)

By Mr. McGough:

Q. Is that correct? A. I believe I have heard of the name.

Q. Did you tell us here the other day in court here that you heard the name of "Ebbie" up 2552
in Elmira? A. Yes, sir.

Q. Which "Ebbie" did you hear about? A. I don't know; it is just that I heard the name, that is all.

Q. Although you heard the name mentioned up there, you don't know anything more about it? A. No, sir.

Q. Are you sure about that? A. Positively.

Q. You don't know whether that "Ebbie" came from Buffalo or the East Side? A. I don't know what "Ebbie" it was; it was an odd name, and that is how I remembered it. 2553

Q. Tiger is an odd name, isn't it? A. Nobody calls me a Tiger.

Q. Nobody at all? A. No, sir. They might have referred to me as Joe T. or Joe, the Tiger, something like that. Nobody called me the Tiger as it was asked here in court.

Q. Joe T.? A. Yes.

Q. What is that? A. I was trying to do away with the name Tiger. I shortened it myself and told people to call me "T", to see if I could not have people get away with that name for me.

Q. Did you ever use the name Tig? A. No.

Q. That was not short enough, but you did use "Joe T"?

Mr. Geoghan: I object to that. It does not mean anything. It was just the same.

By Mr. McGough:

Q. Now, I want you to tell this Court and jury whether you ever heard of anybody else up
2555 in Elmira than the "Ebbie" that you mentioned, with that particular type of nickname? A. I don't know who the name belonged to; all I know is I heard the name "Ebbie".

Q. Now, Mr. Defendant, isn't it a fact, that when you were in Elmira, you had trouble with Beitler and Slip Spielfogel and you went in the "box" as a result of that trouble?

Mr. Geoghan: Objected to.
The Court: Overruled.
Mr. Geoghan: Exception.

2556 A. You can look at the records.

By Mr. McGough:

Q. I am asking you, isn't that a fact? A. No, sir.

Q. But you did go in the "box" twice, is that right? A. Yes, it was for no fighting, either.

Q. Wasn't the fight over your becoming a stool pigeon for the keepers up there while you were there? A. That is a lie.

Mr. Geoghan: I object to it.

The Court: That objection is properly made, unless you tie that up with Beitler and Spielfogel.

Mr. McGough: This is cross-examination, and if he is going to get a breathing spell every time I ask a question, the effect of it is going to be lost.

Mr. Geoghan: I object to that remark, and I ask the Court to reprimand the District Attorney.

The Court: I cannot help that. What 2558
is sauce for the goose is sauce for the gander. The District Attorney stands in no different position from you lawyers. I have held the lawyers to the mark; I hold the District Attorney to the mark. You have heard my ruling that unless you tie that episode up with Beitler and with Spielfogel, this question is objectionable. Proceed, please.

Mr. McGough: Just what I intend to; what I am attempting to do before the statement was made. 2559

Mr. Geoghan: May I have your Honor's ruling on that?

The Court: I have ruled. Sustained in that form.

Q. Did you go in the "box" because the inmates up there found out you were giving information to the keepers? A. No.

Mr. Geoghan: Objected to.

The Court: He said, "no".

Q. How long were you in the "box" on each occasion?

Mr. Geoghan: Objected to.
The Court: Sustained.
Mr. Geoghan: What is the materiality of it?
The Court: Sustained.

Q. But you were in the "box" at least twice?

2561

Mr. Geoghan: Objected to.
The Court: Sustained.

By Mr. McGough:

Q. I think you told this Court and jury that you attended the Loew Theater in Coney Island? A. Yes, sir.

Q. Were you ever in the S. & H. Restaurant, right next to the Coney Island Theater, Loew's Coney Island? A. I might have been; I don't know; I would not say for sure.

2562 Q. How about the Cosmos Restaurant, on the other side of the Theater, on Surf Avenue; were you ever in there? A. I believe I have been in there a couple of times.

Q. Before the Fox case you went in the Cosmos three and four and five times a week, isn't that right? A. No, sir.

Q. Do you know a place called The Stable, down on West 12th Street and Surf Avenue? A. No, sir.

Q. Never heard of it? A. I have heard of it, but I have never been there.

Q. The Stable was a spaghetti place, which is two doors from the bank; isn't that right? A. I do not know; I would not know.

Q. Do you know a girl named Patsy Cochran? A. No, sir.

Q. Never knew Patsy? A. No, sir.

Q. Sure about that? A. Positively.

Q. Know a fellow named Arthur Bruno? A. No, sir.

Q. Lived a few doors away from you on West 8th Street? A. I know that there was a Bruno 2564
family there, but I don't know no Arthur Bruno.

Q. Don't you know an Arthur Bruno that you went to school with when you were a boy? A. No, sir.

Q. His right name is Frank Avila, does that help you? A. No.

Q. You don't know Patsy Cochran who palled around with Arthur Bruno? A. No, sir.

Mr. Geoghan: I object to this line of questioning unless—

The Court: Overruled. 2565

Mr. Geoghan: Exception.

By Mr. McGough:

Q. Before you became engaged you knew a girl by the name of Wanda; isn't that right?

Mr. Geoghan: Objected to also.

The Court: At this time, I don't know what the purpose is. Objection overruled.

Mr. Geoghan: I don't either.

A. Yes; I believe I did.

2566 *Joseph Indovino—For Deft. Indovino—Cross*

By Mr. McGough:

Q. You are not sure? A. No, sir.

Q. What is Wanda's last name? A. I don't know; there are so many Wandas.

Q. You and Wanda were seen in the S. & H. just before the Fox case, isn't that correct? A. That is impossible.

Mr. Geoghan: Objected to.

2567 The Court: He said, "No; that is impossible."

By Mr. McGough:

Q. How about the Cosmo? Did you have Wanda in the Cosmo? A. Never went out with the girl. I was keeping company at the time.

Q. After you started to keep company did you ever have occasion to go down to the S. & H.? A. No, sir.

Q. Or the Cosmo, at all? A. No, sir.

Q. When you came out of the theater, you did
2568 not stop in there for a bite to eat? No, sir.

Q. Do you know a man in Coney Island by the name of Gerardi? A. No.

Q. Gerardi, Mike Gerardi? A. No—last name is not familiar.

Q. Did you ever drive an automobile in which Gerardi and four other men were, on Surf Avenue at West 12th Street?

Mr. Geoghan: Don't answer; I object.

Q. About a month before the Fox occurrence?

2569

Mr. Geoghan: I object to that question; it is incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Geoghan: Exception.

A. I did not have a car at the time. I bought my car in July, the 2nd, 1942—1941, rather.

By Mr. McGough:

2570

Q. I am not asking you when you bought your car. I am asking you if it is not a fact that a month or so before February 15th, you were in a car in Surf Avenue with four men, one of whom was Mike Gerardi? A. No, sir.

Mr. Geoghan: I object to the question.

The Court: Overruled.

Mr. Geoghan: Exception.

By Mr. McGough:

2571

Q. Do you drink? A. Occasionally.

Q. Whiskey? A. Well, whatever it is; wine or whiskey.

Q. Did you ever come out of The Stable Restaurant with Mike Gerardi and the girl named, Patsy Cochran? A. No, sir.

Q. Have you ever made the acquaintance of any of the employes at the Loew Coney Island Theater? A. Beg your pardon?

(Question read.)

A. No, sir; I hardly ever attended that theater.

Q. Do you know a girl by the name of Viola Santamarino? A. No.

Q. Did you know a girl there by the name of Mary Verasco? A. No.

Q. How about Milly Martinelli? A. Don't know any one who works there.

Q. Know a man named Louis Fortino? A. No, sir.

2573 Q. Henry Ruselo? A. No, sir.

Q. I take it, you did not know and do not now know people who worked at that theater, is that right? A. Yes, sir.

Q. Do you know the owner of the S. & H. Restaurant? Know his name? A. No, sir.

The Court: Where is that located?

Mr. McGough: 2930 Stillwell Avenue, right opposite the station.

By Mr. McGough:

2574 Q. How about The Famous Restaurant? A. No, sir.

Q. Have you ever been in The Famous Restaurant on Surf Avenue? A. I believe I have once or twice.

Q. On those occasions, were you in the presence of Morris Malinski? A. No, sir.

Q. Were you ever there at any time when any of the waiters had a bottle of mustard thrown at them? A. No, sir.

Q. Can you tell this Court and jury how much your total wages were during the period while

you were employed by the Star Pad Company? A. Well, I don't know; I have no record of it.

Q. Did you keep any records at home? A. No, sir.

Q. Did you ever mention you did have records at home, to any of the police officers in this case? A. No, sir; I don't believe so.

Q. They questioned you about what happened on the 15th of February, didn't they? A. Yes, sir.

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2576

Q. Did you say you had records home to show where you were? A. No; I did not tell them that I had records at home. I said, "Offhand, I cannot tell you where I was on February 15th, 1941."

Q. You told us that sometimes you earned $6 a day, sometimes, seven and eight at the Star Pad Company; is that right? A. Yes, sir.

Q. With that in mind, can you tell us approximately how much you earned during the time you were with the company? A. I would say sometimes thirty, thirty-five, sometimes ten; all according to the season.

2577

Q. And that was for a period of how many years? A. About three years.

By the Court:

Q. Did they pay you by check or by cash? A. We were getting paid by cash—

Q. Check or cash? A. Cash and then checks.

By Mr. McGough:

Q. At that time, did you have a bank account? A. No, sir.

2578 *Joseph Indovino—For Deft. Indovino—Cross*

Q. Just carried your money on your person? A. Yes, sir.

By the Court:

Q. Before the Fox murder occurred, were you paid by check or by cash? A. By cash.

Q. It was after the Fox murder occurred that they started to pay you by check; is that right? A. I believe some time in 1942, they started to

2579 pay by check.

By Mr. McGough:

Q. Your position up there was sewing machine operator, is that right? A. Yes, sir.

Q. Isn't it a fact that for the whole three months preceding September 30th, 1941—that would be from June 1st, to September 30th—you earned the sum of $49.68? A. I don't know; I don't remember.

Q. Isn't that about right? A. I don't know.

Q. Only $49.68 for the whole period of three

2580 months? A. I don't know.

Q. Does that sound true to you? A. I don't know; I could not say.

Q. Or could that be a mistake? A. I could not say that either.

Q. With that in mind, would you say you were mistaken before when you told us you earned thirty-five, thirty-eight a week? A. No, sir; I did earn that money at times.

Q. For the three-months period ending March 31st, 1942, isn't it a fact you only earned $46.78? A. What was that?

Q. The three months ending March 31, 1942? A. I don't remember.

Q. Isn't it a fact that all the moneys you received from the Star Pad Company only amounts to $728? A. That cannot be.

Q. Take a look at this paper, and see if it does not refresh your recollection (handing paper to witness)?

The Court: From what period to what period, Mr. McGough, does the question 2582
involve?

Mr. McGough: I say during all the time—

The Court: From when to when?

Mr. Geoghan: Let us have the Judge's question. That is very important.

Mr. McGough: My question is right on there. I am repeating it to your Honor. I said, during all the period you worked up there, did you receive it?

The Court: I don't recall what the defendant testified as to when he started 2583
to work.

Mr. McGough: I think he just said now, three years.

Mr. Geoghan: He made a statement that in that period a certain amount was earned.

The Court: When did he start to work, do you say, Mr. Geoghan?

Mr. Geoghan: My recollection is, about two weeks after he was released from Elmira Reformatory in 1939.

The Witness: That is right.

2584 *Joseph Indovino—For Deft. Indovino—Cross*

The Court: 1939 to 1942. The District Attorney is asking him, whether in all that period he earned only $700.

Mr. Geoghan: Yes; but he hands him a letter to indicate that only concerns that period.

Mr. McGough: I asked him would it refresh his recollection.

A. You have here from March, 1940—

2585

By Mr. McGough:

Q. Answer my question, please? A. That would be impossible.

Mr. Geoghan: The District Attorney handed this witness a communication. Now, he is entitled to read it.

The Court: He is asking him if it refreshes his recollection, but in all the time he worked—

2586 Mr. McGough: I will offer the paper in evidence.

Mr. Geoghan: I object to it.

The Court: Let us get this thing clear.

By the Court:

Q. The District Attorney wants to know if during all of the period you worked for this concern, that is from 1939 to 1942, that all that they ever paid you was about $700; is that your statement?

Mr. McGough: Right.

A. It is not true.

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Q. He wants to know if that paper refreshes your recollection. Now look at it. A. It cannot be; it is impossible—$728 in a period of three years.

By Mr. McGough:

Q. May I ask you to examine that paper, and tell us whether it refreshes your recollection, please?

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Mr. Geoghan: Before he answers the question, Judge, will he give us the name of the company? Because there is testimony here that there were two companies—the same organization—but under two different names. It is misleading.

Mr. McGough: This is cross-examination.

The Court: Go ahead, Mr. Witness. Does that refresh your recollection, in any way?

2589

A. No, sir.

By Mr. McGough:

Q. It does not help you? A. No, sir.

Q. All right. May I have it back, please? But there were times when you only earned small amounts like $50 during a close season, when there wasn't any work? A. What do you mean $50? $50 covering how much time?

Q. Well, take three months? A. No.

Q. Weren't you the man working? A. I was working.

2590 Q. During some periods, didn't you come out of that period with only about $50, for a period of three months at a time? A. No, sir; I don't think so.

Q. In other words, that was a place where they were busy almost all the time? A. I would not say all the time; no, sir.

Q. Can you tell us, in the off season, would the shop be closed down sometimes? A. Maybe for about three days, four days.

2591 Q. What did you do when the shop was closed down? Did you get any outside work? A. I was at my fiancee's home.

By the Court:

Q. You mean night and day? A. Well, I used to do some work there, painting.

Q. Night and day? A. No, not night and day, no, sir, but I would be there up until about 11 o'clock or 12 o'clock at night.

By Mr. McGough:

2592

Q. I suppose then you would have more than the supper meal? A. Yes, sir.

Q. You would have lunch? A. At times.

Q. You would go over there sometimes for breakfast, too? A. No, sir.

Q. Your mother was alive at that time? A. Yes, sir.

Q. Your mother cooks? A. Yes, sir.

Q. Never had an evening meal with your mother during that whole period you told us about? A. We were living with my sister.

Q. Did you ever have an evening meal with your sister during that year for eight months? A. No, sir.

Q. Never had a Sunday dinner with anybody else except your fiancee? A. Yes, sir.

Mr. Geoghan: I think the answer is not the answer the witness intended to make. I think he said, "Yes, sir", when I think he means, "No, sir."

Mr. McGough: I submit the answer 2594
is clear; the question is also clear.

Mr. Geoghan: The answer is not clear at all.

The Witness: Maybe it is not clear.

Mr. Geoghan: The way the question is put—I will clarify it—go ahead.

By the Court:

Q. You mean you had no meal with anybody else other than the fiancee? A. That is right.

Q. During that period? Is that what you 2595
mean? A. Every Sunday I went there.

Q. Nobody else? A. Nobody else.

By Mr. McGough:

Q. In other words, and so far as the evening meal was concerned, you always had it with your fiancee, is that correct? A. Yes, sir.

By the Court:

Q. Did you ever go over to New York and find that they did not need you at the place that

day? A. Well, no. The boss always wanted us to stay around even if there was no work, we would have to stay in the shop.

Q. You would stay around, but you would leave before six o'clock, five o'clock, if you found there was nothing to do? You would not stay there all day doing nothing, not being busy? A. Sometimes we would start; he would give us enough work just to hold us in the shop.

Q. I mean when there was a slack season? 2597 A. Yes, sir.

Q. You would go into the place, you would find there is no work; if you saw there was just a little bit of work there you would not be staying in the shop all day? A. No; not if the boss don't want us.

Q. You would go away? A. Yes, sir.

Q. Go right back to the fiancee's house? A. Maybe I would go home and go there from home.

Q. Wouldn't you take in a movie in the afternoon around 14th Street? A. No, sir.

2598 Q. Take a walk? You would go right back to the house? To the fiancee's place? A. Yes; you see at times I had plenty of work to do at her house; I would paint or something else.

By Mr. McGough:

Q. Now, you told us you don't know what the East Side of New York looks like? Are those the words you used? A. Yes; I believe so.

Q. How about the Melrose cafeteria down on Avenue C between East 7th Street; were you

ever in there at night? A. I don't know where it is at; no, sir.

Q. And, of course, never having been there, you could never see Beitler or Rudish at that particular place? A. I don't know them.

Q. How about a bar and grill on Broome Street, were you ever there at any time in your life? A. No, sir.

Q. You are sure about that? A. Positively.

Q. Do you understand now what I am saying to you, the Melrose cafeteria? A. I don't know 2600 where the Melrose is at. I don't know where this Broome Street is at.

Q. Are you familiar with Avenue D, between East 7th and 8th Streets? A. No, sir.

Q. You are certain that so far as you and Beitler and Rudish are concerned you were never there at any time, either with them or without them? A. I don't know them, so how could I be any place with them?

Q. That is right. In other words, you were never at the Melrose at any time? A. That is right. 2601

Q. You became married some time in April of 1941, is that correct? A. That is right.

Q. How much money did you have at the time you were married? A. I believe about two hundred.

Q. That was the money you had yourself on your person? A. No; I used to give it to my fiancee every week.

Q. Did you buy a ring? A. Wedding band?

Q. An engagement ring? A. Well, I bought the setting; the stone came from my mother-in-law.

2602 Q. You had a jeweler put the stone in the setting? A. Yes, sir.

Q. How much did that cost you? A. I believe about fifteen or twenty dollars.

Q. And the wedding band? A. About four dollars.

Q. Buy them in the same place? A. No, sir.

Q. Where did you have the stone set? What is the name of the place? A. I cannot recall the name of the place. It is on the Bowery
2603 somewheres near Canal Street.

Q. That is where you took your mother's solitaire and had it put in a separate mounting: is that right? A. Yes.

Q. You don't know the name of the place? A. No, sir.

Q. The first time you were there? A. Yes.

Q. Last time? A. Yes, sir.

Q. Just walked along the Bowery and walked in cold without anybody to help you find the place? A. That is right. There are so many places there, you are bound to find one.

2604 Q. Is that the first time you were on the Bowery? A. I believe so.

Q. Did you ever go straight up the Bowery to about 8th or 9th Street? A. No, sir.

Q. You never went back to that jewelry store; right? A. No, sir.

Q. How about the band, where did you buy that? A. On the Bowery also.

Q. Same place? A. In a different place.

Q. Know the name of the place? A. No, sir.

Q. Know the location? A. It is near Canal Street.

Q. Did you ever know a girl by the name of Eva Gomberg? A. Yes.

Q. Where does she live? A. I don't know where she lives at now, but she was living on 78th Street, I believe.

Q. Do you know, between what avenues? A. I think it is 21st and 22nd Avenues, something like that.

Q. Was she a friend of Wanda's? A. Not that I know of.

Q. You bought some furniture, Mr. Defendant, at the time you were married, did you not? A. Yes, sir. 2606

Q. How much did that cost you? A. I believe it was $225.

Q. And was that purchased with the money that you say your fiancee was holding for you? A. Well, I gave a down payment with that.

Q. You bought the furniture on time? A. I was given three months time, which would be considered as cash, so I would not have to pay any interest on it.

Q. There was a time when you paid that up in full; is that right? A. Yes.

Q. Do you recall when it was you made your 2607 down payment on the furniture? A. I cannot recall that.

Q. What was the down payment? A. I don't remember that either.

Q. Was it $60 down payment? A. I believe so.

Q. Was that your money? A. Yes, sir.

Q. You had it on your person? A. At the time that I went for the furniture; yes.

Q. That was not part of the two hundred that your girl had? A. That is part of the two hundred.

Q. So that when you made the down payment you made of $60, there was, say, a hundred and forty or thirty dollars left? A. Yes; I believe so.

Q. Of course, you bought the furniture before you were married, is that right? A. Naturally.

Q. Can you tell us approximately when it was that you made that down payment? A. I don't remember.

Q. Could it be February 17th?

2609

The Court: What year?

Mr. McGough: 1941—married in April.

A. I don't remember just when I made the down payment.

By Mr. McGough:

Q. And then the balance, did you pay that all off in one lump payment? A. No, sir; made two more payments.

Q. That would be two payments of how much?

2610 A. I don't remember just how I paid that. One payment was made by the—when the furniture arrived—the other payment was made about a month after my marriage.

Q. So that you made three cash payments, is that correct? A. Yes.

Q. The deposit and then two more; right? A. That is right.

Q. Do you owe them any money now? A. No, sir.

Q. Did you sign a note for part of the balance? A. Yes.

Q. Was that note paid? A. Yes, sir.

Q. That note originally was not due until May of 1943; is that right? A. I don't know when it was due, but when it was due they came around for it.

Q. How long ago was that note paid? A. I don't know. It was paid about a month after I got married.

Q. Of course you went on a honeymoon? A. Yes.

Q. That cost money? A. I believe it did. 2612

Q. How much did it cost you? A. I would say about a hundred dollars.

Q. Did that come out of the two hundred, too? A. No, sir. You get married, people give you presents, don't they?

Q. How much did you receive from your friends as presents? A. I believe about three fifty.

Q. $350? A. Yes, sir.

Q. Was that money saved or was it spent? A. I cannot give you an account of every nickel that I got and every nickel that I spent. 2613

Q. See what you can do with the 350; can you give us any idea of where that went? A. I don't remember.

Q. Was it all spent, was part of it spent, was some money put in the bank?

Mr. Geoghan: I object to this. I have not objected because I assumed it is going to attack his credibility. I think he is going far afield now.

The Court: Objection overruled.

Mr. Geoghan: Exception.

2614 By Mr. McGough:

Q. Can't you remember anything about the $350 you say you received as presents? A. Yes; part of it went for the last payment.

Q. What part of it? A. Part of the $350 went for the last payment.

Q. How much? $10? $60? $80? A. I don't remember the amount.

Q. Didn't you handle the transaction? A.
2615 Yes, sir; I did.

Q. You had the $350 after you were married. You kept it? A. I did not keep it on my person; no. I gave it to my wife; my wife gave it to her mother.

Q. None of it went into a bank? A. No, sir.

Q. Did you ever have a bank account at any time in your life? A. No, sir.

Q. The parole officer ever discuss with you opening a bank account? A. No, sir.

Q. Even when you were working with the Lacomastic, you say you never had a bank ac-
2616 count? A. No, sir.

Q. Is Indovino the name of your father? A. Yes, sir.

Q. Was the name ever changed? A. No, sir.

Q. Got any brothers? A. Yes, sir.

Q. Their names are Indovino? A. Yes, sir.

Mr. McGough: That is all.

The Court: May I just ask a question or two?

By the Court:

Q. You say you bought a car in July of 1941? A. Yes, sir.

Q. What kind of car was it? A. 1936 Dodge.

Q. But it for cash? A. No, sir. My father-in-law was financing the olive oil and cheese business I went into and he gave me a check for $60 to put down as payment.

Redirect examination by Mr. Geoghan:

Q. That is the car you used in that cheese business, isn't it? A. Yes.

Q. To deliver your orders? A. Yes. 2618

Q. Your father-in-law made a down payment? A. Yes.

Q. It is an Italian custom, is it not, at the time of a wedding, to give money as presents?

Mr. McGough: Objection.

A. Yes, sir.

Mr. Geoghan: He questioned him along that line.

The Court: All right.

Mr. Geoghan: That is all. 2619

The Court: Step down.

Mr. Geoghan: The defendant Indovino rests.

The Court: Do you wish to proceed with rebuttal as far as Indovino is concerned, or do you want to wait until after the other defendants have rested?

Mr. McGough: I would prefer to wait until all the defendants have rested. I have a motion. I would like permission to reopen the People's case to put on one very short witness that will clear up what

is obviously an inconsistency in the record with respect to when Harry Levine got out of State's prison.

The Court: You mean out of Elmira?

Mr. McGough: Out of Elmira.

Mr. Geoghan: As far as Indovino is concerned, I object.

The Court: Objection overruled. That testimony has no bearing on Indovino at all.

2621 Mr. Geoghan: Exception. No, it has not, but it is novel after the defense starts.

The Court: I will let you open the defense if you deem it advisable.

Mr. Carabba: Your Honor instructs the jury it has no bearing on the defendant Rudish?

The Court: We will see. The motion of the District Attorney is granted.

2622 SOLOMON C. SCHOENBERG, residing at 956 50th Street, Brooklyn, called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. What is your occupation, Mr. Schoenberg? A. I am a parole officer, New York State.

Q. Employed by the Executive Department, Division of Parole? A. That is right.

Q. Pursuant to my request did you check the records of your department to see if one Harry

Levine was a parolee and under the supervision of your board? A. I did.

Q. Did you ascertain what prison Harry Levine was confined to, please? A. He was confined to Elmira Reformatory.

Q. I show you this photograph, marked People's Exhibit 15 in evidence, and I ask you if that is the Harry Levine that you told me was confined to Elmira Reformatory? A. He is.

Q. What date was Harry Levine released from Elmira Reformatory? A. May I have the 2624
folder, please? (Folder handed to witness who examines it) He was released from the Elmira Reformatory on March 5, 1940.

By the Court:

Q. Was he out of Elmira thereafter? A. Yes; he was. He was—

Q. What I mean is, was he returned to Elmira thereafter? A. No; he never was.

Q. He continued at liberty after March, 1940? A. He did.

2625

Cross-examination by Mr. Solovei:

Q. That record show when he went to Elmira? A. Yes; it does.

The Court: The sister, as I recall it, said it was 1941?

Mr. McGough: First, Judge, on page 688, she said it was in March, I think, of 1941.

Mr. Solovei: March 15, 1941.

The Court: The parole officer gives us

the release from the official records, is that it?

The Witness: That is right.

The Court: He says March, 1949.

Mr. Solovei: That is what he says now.

The Court: Any cross-examination?

Mr. Solovei: Yes; I am asking when he went in.

2627 A. He was received in the Elmira Reformatory, the 23rd day of May, 1938.

By Mr. Solovei:

Q. And released from there? A. March 5, 1940.

Q. Did he continually make his parole to you, report to you? A. He reported to parole officers up until October 9, 1941, when he made his last report to the New York office.

Q. Did he ever make any report to you?

2628 The Court: Of what materiality is this fact, Mr. Solovei? This witness was just brought on the stand to testify to a date when the man was released from Elmira Reformatory.

Mr. Solovei: Will you give me—

The Court: (Continuing) Because the sister on Saturday testified that he was released in 1941, in March. Now the District Attorney, I understand, brings this witness on the stand so that he can give us the official date from the official records when the man was released. He

says it was in March, 1940. That is all he has testified to.

Mr. Solovei: Will you give me an opportunity to follow my questions? It may be material, it may be important.

The Court: All right; go ahead.

Mr. Solovei: Cannot do it with one question.

The Court: Very well, Mr. Solovei, you shall have the opportunity.

Mr. Solovei: I certainly do not want 2630
to take up time unnecessarily.

The Court: All right; go ahead.

A. He made several reports to me.

By Mr. Solovei:

Q. This report that you have now in your possession, which you are reading from, did you make that report up? A. I made some of these reports up.

Q. Are you sure now that this Harry Levine is the same Harry Levine that you are talking 2631
about here in this courtroom? A. Yes.

Q. Did he report to you on February 15, 1941? Will you look? A. He did not report to me at that time. He may have reported to other parole officers.

Q. See if he reported to anybody on February 15, 1941? A. No; he did not.

Q. When was it he reported in the month of February, 1941? A. Reported on February 4th, 1941, February 11th, 1941, February 18th, 1941, February 25th, 1941.

Q. What is the address of the Harry Levine you have there? A. As of what date?

Q. As of the date of his release from Elmira? A. 560 Bristol Street, Brooklyn.

Q. That is the address of 1940? A. That is right.

Q. When he made his reports what address have you got there of this Harry Levine you are talking about? A. 715 Hopkinson Avenue, Brooklyn.

2633 Q. When is the last time he reported, according to that paper, please? A. Last time he reported to the New York office was October 9, 1941.

Q. You say he was released on March 5, 1940, and the last time he reported, October 9, 1941; is that correct? A. That is correct.

Q. So that it is fair to assume from March 5, 1940, to October 9, 1941, he continuously reported to some probation officer or parole officer in the Parole Department of the State of New York; is that correct, Mr. Schoenberg? A. With the exception of the time that he was in the

2634 Tombs for violation of parole.

Q. When was he in the Tombs for violation of parole? A. April 12, 1940, and he was released from the Tombs prison on May 31, 1940.

Q. May 31st when? A. 1940.

Q. Was there any other violation of parole that he did? A. No.

Q. Sure about that? A. Yes, sir.

Q. Would that record show where he was on February 15, 1941? A. No, sir.

Q. Would your record show when he enlisted in the service? A. According to a Mrs. Glass-

berg we were advised that he was sent to Camp Dix on the morning of October 21, 1941.

Q. Would that show the actual enlistment, or does that mean he might have been around here in the City of New York prior to going to Camp Dix? Do you know from your records there? A. We did not see him after October 9, 1941.

Q. Did he make his parole so that he did not have to make any more reports? A. October 9, 1941. No; he failed to report on October 14, 1941, when he was due to report. 2636

Q. Is there any report on that, for the failure to make his report? A. Simply a notation that he failed to report.

Q. Nothing else on that at all? A. No.

Q. You were informed he was in the Army? A. On October 21st I telephoned to the Local Draft Board and was told he was sent to Camp Dix that morning.

By the Court:

Q. The Draft Board gave you that information? A. Yes, sir. 2637

By Mr. Solovei:

Q. Mr. Schoenberg, when he violated the parole, you say you sent him to the Tombs prison, you did not send him back to Elmira? A. He was not sent back to Elmira.

Q. Was he sent back to Elmira at any time? A. No, sir.

Q. The picture that was shown you, you recognized the picture as the same Harry Levine

2638 you say you have a record in your hand of? A. Yes.

Q. That you are positive of? A. Yes, sir.

Q. The sister of Harry Levine was here and testified and said that he was at Elmira on March 15, 1941. You say that, of course, she is mistaken about that? A. Yes.

Mr. Solovei: That is all.

Mr. McGough: That is all, Judge. I now rest.

2639

Mr. Geoghan: I make the usual motion at this time, unless you want us to wait until all of the defendants have produced their testimony.

The Court: I think so.

Mr. Geoghan: Wait until they are all in?

The Court: Yes; he may have some rebuttal. Do we have to go through the formality now and consider the case closed and the motions renewed and all that red tape? Suppose we put on the

2640 record that it is deemed that the People have again closed the case, and the motions are made by counsel, and the same rulings and exceptions?

Mr. Geoghan: Yes, sir; in other words, on all the grounds that have heretofore been stated I now move to dismiss the indictment; and take an exception.

The Court: Everything that transpired at that time to be deemed to have transpired now, with the same force and effect.

2641

Mr. Geoghan: Exception.

The Court: As to each defendant.

Mr. Carabba: No, your Honor is ruling only as to Indovina, isn't that correct?

Mr. Geoghan: That is all I ask. I am simply representing Indovino.

The Court: As to all defendants, as far as this particular new testimony is concerned.

Mr. Carabba: Oh!

2642

The Court: All right; proceed.

Mr. Geoghan: I don't know whether I make myself clear. I assume now that as far as the case of Indovino is concerned the case is closed, the District Attorney has rested and I have rested.

The Court: Let us make clear just where we are. The District Attorney opened his case in chief. I permitted him to do that to clear up this apparent discrepancy as to the date of Levine coming from Elmira. Now the case, as far as the People are concerned, is closed again. They have reopened; it is now closed again; and motions made by counsel at the close of the People's case are now deemed to have been renewed, same rulings and exceptions. Does that straighten out the record?

2643

Mr. Carabba: That clears it up.

Mr. McGough: Your Honor and I discussed a moment ago as to whether there is any rebuttal I may put in.

The Court: Yes. This is the People's

case, and now we are on Indovino's defense. Mr. Geoghan has now said that the defendant Indovino has rested; and you may proceed. You say you want to reserve your right to introduce evidence in rebuttal, do you not, at the close of all of the defenses?

Mr. McGough: Yes.

The Court: I will give you that opportunity instead of compelling you to do it at this time. Then Mr. Geoghan will have the right to make another motion.

2645

Mr. Geoghan: Oh, yes.

The Court: All right, proceed, gentlemen; or would you want a few moments recess—or do you want to go right along until one o'clock?

The Jury: Right along; continue.

RUBIN JALKOVER, residing at 985 Intervale Avenue, Bronx, called as a witnesss in behalf of the defendant Rudish, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

2646

Direct examination by Mr. Meadow:

Q. Do you know the defendant Sidney Rudish? A. I do.

Q. Do you know the defendant Morris Malinsky? A. I have seen him a few times.

Q. Do you know the defendant Indovino? A. I do not.

Q. Now, do you recall a day in the Spring of 1941 in reference to the defendants Malinsky and Rudish? A. I do.

Q. What is your answer? A. Yes.

Q. Do you know anyone by the name of Davie Yellin? A. Yes.

Q. Will you tell us what occurred in the evening, in the Spring of 1941, in reference to the defendant Rudish, the defendant Malinsky and one Davie Yellin? 2648

Mr. McGough: I object unless the time is fixed, and the location.

By Mr. Meadow:

Q. All right; did this occurrence occur—

The Court: Let him tell us where it occurred.

By Mr. Meadow:

Q. All right; you tell us where it happened and approximately when? A. One night— 2649

Mr. McGough: I object unless the time is fixed. He says "One night."

Mr. Meadow: Let him finish. I presume he is going to give us the time. The Judge asked him.

Mr. McGough: I object unless the time is fixed.

The Court: Fix the time.

A. One night between nine and ten o'clock.

By the Court:

Q. No; not the hour—the time—what month? A. I don't know the month.

Q. What year? A. It was 1941. I don't remember the date.

Q. When in 1941? A. It was in the Spring of 1941.

The Court: All right.

2651

A. (Continued) One day—

By Mr. Meadow:

Q. Tell us where. A. Mr. Rudish and I were walking on East 8th Street between Avenue C and D, and we were walking on Avenue D to 7th Street, the corner of 7th Street and Avenue D; and we stood at the corner of 7th Street and Avenue D. There is a candy store there. A few minutes, while waiting there, Davie Yellin and a fellow by the name of Slip walked outside
2652 of the candy store and were standing on the corner. This fellow Davie introduced myself and Jake to this fellow Malinsky; also introduced me to this fellow Slip. At that time we stood there a few minutes, five or ten minutes.

By the Court:

Q. Introduced you and Jack? A. Jake.

Q. Who is Jake? A. Rudish. We stood a few minutes there and we walked away, we walked towards 4th Street, I think it was, and Avenue D; and I left them a little while later.

By Mr. Meadow:

Q. You say "we walked away", whom do you mean? A. Mr. Rudish and I.

Q. Now, you testified that you had this conversation in the Spring of 1941. Will you tell us, if you know, the type of clothing that you were wearing then at that meeting? A. I was wearing light clothes.

Q. Describe it to us, please, what you mean? A. I was wearing a pair of slacks and a sport 2654
jacket, polo shirt.

Q. Did you have an overcoat on? A. No.

Q. Did you have a hat on? A. No.

Q. Did you ever meet Slip before that night? A. No, sir.

Q. Is there anything else in your mind that fixes the time to be in 1941, in the Spring of 1941? A. I was not working in the winter all the time. I was out of work about six weeks; and I am a pretty steady worker; and I never was out of work more than a week or so; and I was out a little over a month. 2655

Q. You say a short time previously to this meeting you were out of work for a period of about six weeks?

The Court: He did not say that. That is what you are saying.

Mr. Meadow: I thought he did. Speak louder, will you, please?

The Court: He just said he was out of work for a period—

The Witness: About a month.

The Court: Of about a month—does not say when he was out of work.

By Mr. Meadow:

Q. When was this occasion when you were out of work for a period of about a month? A. Some time in the Winter.

Q. Winter of what two years? A. Winter of 1940.

Q. You mean by the year of 1940—you know the Winter starts in December—do you mean the December of 1940 or December of 1939? A.

2657 December of 1940.

Q. And you had been out of work for a month, is that right? A. Approximately a month; I don't exactly know.

By the Court:

Q. You say it was during that month you were out of work you first met the defendant Malinsky and the man Spielfogel? A. No.

The Court: I don't know what he is talking about. Proceed to clear it up.

2658

By Mr. Meadow:

Q. You say that you were out of work in the early portion of the winter of 1939 and 1940, is that accurate? A. Yes.

Q. Now in relation to that time, when was it that you say this meeting occurred? A. 1941, in the Spring.

Q. It was subsequent to this period of a month that you were out of work? A. Yes.

2659

Cross-examination by Mr. McGough:

Q. How long did you say you know David Yellin? A. I did not say how long I knew him. I have seen him quite a few times.

Q. When was the first time you saw him? A. I don't remember the first time I saw him.

Q. Can't you tell us approximately when it was, what year? A. I don't remember.

Q. Five years? A. Oh, no, not five years.

Q. Ten? A. No.

2660

Q. How long? Three? A. A short time before—some time in 1940.

Q. You met him the first time in 1940? A. I think so.

Q. Do you recall what part of 1940? A. I do not.

Q. How old are you, Jalkover? Is that the way you pronounce it? A. Jalkover.

Q. How old are you? A. I will be 26 next month.

Q. Married or single? A. I am married.

Q. Got a family? A. I have got a son.

2661

Q. How old? A. Three years and two months.

Q. Living with your wife and your son? A. Yes.

Q. Up in Intervale Avenue? A. Yes.

Q. What do you work at? A. I am a machinist.

Q. By whom are you employed? A. Mantle & Co., Machinists.

Q. How do you spell Mantle? A. M-a-n-t-l-e, I think.

Q. How long had you been with Mantle & Co.? A. Oh, a few days.

Q. A few days? A. Yes; I have just got this job.

Q. Where are they located? A. On 128th Street, Park Avenue.

Q. Is that the last job you had? A. No; that is not the last job I had.

Q. What was the last job you had? A. The last before this one? I worked for the Essential Tool & Die Co., 1 Perry Street, New York.

Q. How long were you with that company?
2663 A. Four months.

Q. When did you quit them? A. I think it was May 18th.

Q. And you have been out of work for almost a month before you went with Mantle & Co.? A. No; I worked for a few days for Edward Ermold & Co.; they are some place on Hudson Street.

Q. How do you spell that man's name? A. E-r-m-o-l-d & Co.

Q. Where is that business located? A. On Hudson Street, I think it is Hudson and 14th Street.

2664 Q. What kind of work did you do there? A. Machine shop.

Q. How long were you there? A. I just had a try-out there.

Q. You did not work there? A. I worked there, sure; I had a try-out.

Q. How long? A. Four days, four and a half days.

Q. Before the Essential Tool & Die Company, where did you work? A. Brooklyn Navy Yard.

Q. Civil Service worker? A. Yes, sir.

Q. Did you take an examination? A. Yes.

Q. What was your title? A. Machinist.

Q. What grade? A. Third.

Q. That is a beginner; right? A. They start off all the machinists—

Q. Like a helper? A. No; every machinist has to start off at third grade, and you work yourself up.

Q. When did you go to work for the Navy Yard? A. I don't recall? I don't remember the date I went to work for them.

Q. How long did you work down in the Navy 2666
Yard? A. About five months.

By the Court:

Q. What year? A. 1942.

Q. You have been convicted, haven't you? A. For disorderly conduct.

Q. Served time? A. Never.

Q. Never been convicted for a felony? A. No, sir.

Q. Were you dropped from the Navy Yard for any purpose? A. No, sir.

Q. Any reason? A. No. 2667

Q. Were you discharged or laid off? A. No.

Q. Just left of your own will? A. No, sir; I got a release from them.

Q. You terminated your employment after five months? A. I asked for a release to go i[illegible] more essential work.

Q. From there you went into the— A. Essential Tool & Die.

Q. Tool and Die Company, and you spent four months with them? A. Yes, sir.

Q. Now, you are down with Mantle & Co.? A. Yes, sir.

Q. How long do you know Spielfogel? A. I have met him once or twice.

Q. Can you tell us when was the first time you met him? A. The first time I met him was about a week or so before I was introduced to Mr. Malinski.

Q. When was that? A. Sometime in the Spring of 1941.

Q. How long do you know Rudish? A. For a number of years.

2669 Q. How long? Can't you tell us? A. I have to think; I don't know exactly.

Q. Take a little time to think? A. A few years. I think it was 1938.

Q. Did you ever work with him? A. No, sir.

Q. He is a machinist, is that right? A. I think he is an automobile mechanic.

Q. Never worked with him; right? A. No, sir.

Q. Any way, you say that some time in the Spring of 1941 you were on 8th Street between C and D; is that right? A. Yes.

Q. Who were you with? A. I was with Mr. Rudish.

2670 Q. What do you call him? Jake? A. I call him Jack.

Q. And you were walking along, is that right? A. Yes.

Q. Which way were you going? A. Going towards Avenue D.

Q. Avenue what? A. D.

Q. And what happened? A. Well, came to Avenue D and 7th Street, the candy store on Avenue D and 7th Street.

Q. Did you say you were on 8th Street going

along between C and D, towards D? A. We were between C and D on 8th Street.

Q. Yes. A. Walking on Avenue D to 7th Street.

Q. I thought you said you were on 8th Street proceeding between C and D? A. I don't know what you mean. I know what I mean. I was in the middle of the block, on 8th Street between C and D, walking towards Avenue D.

Q. Walking towards the water; right? A. Yes. 2672

Q. What happened as you were walking on 8th Street between C and D going towards D or the water? A. We turned the corner towards 7th Street and Avenue D.

Q. Turned the corner where? A. On 8th Street and Avenue D, and walked to 7th Street and Avenue D.

Q. So you are on the corner of 7th Street and Avenue D; right? A. Yes.

Q. What happened there? A. Well, Jack and I stopped at the corner. We were standing there and Mr. Malinski and this fellow Slip, 2673 Davie Yellin and a few other people that were in the store—there was quite a few people—

Q. You say "in the store"? A. They were in the store.

Q. I thought you were on the corner? A. I was on the corner.

Q. While you were on the corner, what happened? A. I am explaining to you.

Q. Go ahead. A. Those people that I just mentioned, were in the store.

Q. In the candy store? A. In the candy store.

Q. That would be Yellin, Malinsky and Slip; right? A. Yes.

Q. Where was Jack? A. Jack was with me.

Q. On the corner? A. Yes; we were standing a few minutes, maybe a minute or two; and Davie Yellin came outside and Malinsky came outside and Slip.

Q. By the way, how long do you know Malinsky? A. I never knew him until the first day I met him.

2675 Q. Go ahead? A. They came outside; Davie introduced me and Jack to this fellow Malinsky.

Q. That is, Dave Yellin? A. Dave Yellin introduced me.

Q. Introduced Rudish and you? A. And me, to this fellow Malinsky.

Q. Wait a minute now; Dave Yellin introduced you and Rudish to Malinsky? A. Yes, sir.

Q. What did he say? A. I don't know. I don't remember what we were talking about.

Q. What did he say? How did he introduce you? A. This is "Ruby".

2676 Q. Who was he talking to? A. Malinsky, probably.

Q. Don't you know? A. I know.

Q. Tell us what you say Dave Yellin did; tell us what you heard him say. A. Dave Yellin introduced me to Malinsky.

Q. Tell us the words he used? A. He said, "Moish, this is Ruby and this is Jack—Jake" he said.

Q. "Moish, this is Ruby"? A. Yes.

Q. What else? A. "And this is Jake".

Q. What else was said? A. We spoke for a few minutes.

Q. Did Yellin say anything else? A. He most probably spoke a few words. I don't remember exactly what he said.

Q. That is all you remember of that conversation? A. That is all.

Q. "Moish, this is Ruby, and this is Jake." Is that right? A. Yes.

Q. Did you hear what Jake said? A. He said, "How are you." I said, "How are you."

Q. Didn't he say, "I know you already; how are you?" A. No. 2678

Q. "What is your last name?" A. My name?

Q. Didn't you hear Jake say anything like that? A. No.

Q. What did you say? A. I didn't say a word. A. I just said it to Malinsky.

Q. You did not say anything to him? "How are you?" A. I said, "How are you?" Naturally, when I was introduced.

Q. Let me understand this. Yellin introduced you and Rudish to Moish; is that right? A. That is right.

Q. You did not say anything? A. I did not say anything. 2679

Q. Jake said, "How are you?" Is that right? A. Yes.

Q. You said nothing? A. I said the same thing.

Q. I am asking you what did you say? A. I don't know what you mean, "Did I say anything"—did I converse with him or what? I don't know what you are talking about.

Q. You are telling us now that Yellin introduced you and Rudish to Moish? A. That is right; yes.

Q. You said Yellin said, "Moish, this is Ruby and this is Jake"? A. Yes.

Q. Jake said back, "How are you?" And I asked you, what did you say, and you said "nothing"? A. I said the same thing. I did not know what you meant.

Q. You said what? A. I said, "How are you?"

Q. How do you spell your name? A. J-a-l-k-o-v-e-r.

2681 Q. Do you have any other name? A. I have no other name but the name Zalkoff.

Q. Come again. A. Zalkoff.

Q. How do you pronounce it? A. Zalkoff, that is the name that is on the birth certificate. I have nothing to do about that.

Q. What name does Davie Yellin know you by? A. Ruby.

Q. That is all? A. Yes.

Q. No last name? A. No.

Q. In addition to being known as Ruby Jalkover, you say you are also known as Rubin

2682 Zalkoff? A. I am not known by that name. I say that is the name that is on my birth certificate.

Q. Zalkiff? A. Yes; my name is Jalkover. I have been known by that name as long as I can remember.

Q. At the time you say this introduction took place, were you working? A. Yes.

Q. Where were you working then? A. I don't remember the place I was working at that time. I worked with quite a few people. I had plenty of jobs. I don't recall the job.

Q. You don't recall where you were working at that particular time? A. Yes.

Q. Are you sure of this conversation that you say happened? A. Yes.

Q. Related to Rudish? A. No.

Q. Related to his wife? A. No.

Q. Your wife related to him? A. No, sir.

Q. Before you came here to court, did you talk to anybody about this case? A. Yes.

Q. Where? A. A few times I was up at Mr. Meadow's office. 2684

Q. You mean the lawyer here that represents Rudish? A. Yes.

Q. When was the last time you were up in the lawyer's office? A. I think a week or so ago.

Q. Who were you with? A. Myself.

Q. Any of Rudish's relatives there? A. No, sir.

Q. Who took you to his office? A. I went there myself.

Q. Who gave you the address? A. Mrs. Rudish.

Q. You visited Rudish at the jail? A. No, sir. 2685

Q. Did you see Mr. Rudish or Mrs. Rudish? A. Mrs. Rudish.

Q. She came to your home and gave you the name of the lawyer? A. No.

Q. Mail it to you? A. No.

Q. Give it to somebody else? A. No.

Q. How did you come to know the address of the lawyer? A. I went down to the house.

Q. When was that?

2686 *Rubin Jalkover—For Deft. Rudish—Cross*

By the Court:

Q. Whose house? A. Mrs. Rudish—oh, some time ago.

Q. Is he a friend of yours, Rudish? A. I know him sometime past.

Q. Is he a friend of yours, Rudish? A. I would not call him a friend; an acquaintance of mine.

2687 By Mr. McGough:

Q. Who is an acquaintance, whom do you mean by an acquaintance? A. Mr. Rudish.

Q. Did anybody ask you to go down to the home of Rudish where you say you got the address of the lawyer? A. No, sir.

Q. You knew he was coming on for trial, didn't you? A. Yes.

Q. You just thought you could help? A. I wanted the truth to be known about the situation.

2688 Q. Where were you living at the time you say this conversation took place?

The Court: I would just like to be clear in my mind what the witness has just said.

By the Court:

Q. You say you wanted the truth to be known about the case? A. Yes.

Q. Is that right? A. Yes, sir.

By Mr. McGough:

Q. You did not go to the District Attorney—

By the Court:

Q. Were you told that it would be important to establish that Rudish did not know Malinsky until after Fox was killed? A. No.

Q. Were you told that? A. No, sir.

Q. What do you mean by the statement that you wanted the truth to be known? Truth as to what? A. Truth that he did not know this fellow Malinsky. 2690

Q. Until when? A. Until after this crime had happened. When I read about this here I knew for a fact he was with me at the time away after this thing happened, some time in the Spring of 1941.

The Court: Proceed.

By Mr. McGough:

2691

Q. At the time that the introductions were going on, where was Spielfogel? A. He was standing by us; he was outside, too.

Q. Was he standing right there in the circle? Could he hear what was said? A. Yes.

Q. Was he introduced? A. No.

Q. You and Jake were introduced to Moish; Slip was not introduced, is that right? A. No, sir.

Q. Did he say anything? A. I don't recall if he said anything.

Q. Are you sure Yellin did the introducing or was it Slip? A. It was Yellin.

Q. I asked you before where were you living at that time? A. I was living in the Bronx.

Q. What is the address? A. 1108 Intervale Avenue, I think it was, same street.

Q. Is that 1108 Intervale Avenue? A. Yes.

Q. How long have you lived at your present address? A. For six months, seven months.

Q. Live alone there? A. I live with my wife and son.

2693

Q. I mean just your family? A. Yes.

Q. Any one else? A. No; no one else.

Q. Now, after the introductions were finished, where did you go? A. I walked with Jack towards 4th Street and Avenue D.

Q. Down to the Citadel Club? A. Never heard of the place.

Q. What is that 4th Street and Avenue D? A. Nothing in particular.

Q. Were you ever in the Melrose Cafeteria? A. Many times.

Q. How many times did you see these defend-
2694 ants there together? A. Never saw them together.

Q. Did you ever see Jack in the Melrose? A. We had dinner, I think, two times—I think it was twice.

Q. You saw Jack there then? A. Yes.

Q. Who was he with? A. With me.

Q. You had dinner with him? A. Yes, sir; once.

Q. How about Malinsky? A. Never was with us.

Q. Was he in the place at the time that you and Rudish ate? A. No, sir.

2695

Q. Were you ever in Hawthorne? A. Yes, sir.

Q. Is that where you first met Rudish? A. No, sir.

The Court: Hawthorne is what?

Mr. Carabba: Hawthorne?

Mr. McGough: Hawthorne, New York.

The Court: Just a place—Hawthorne, New York?

Mr. McGough: Yes.

2696

By Mr. McGough:

Q. Did you ever see Rudish there? A. No.

Q. Saw Malinsky there? A. No, sir.

Q. Can you tell us when you were in Hawthorne? A. I think it was 1932; I am not sure about that.

Q. How long were you there? A. A little over a year.

Q. Did you go there in 1932? A. I don't remember. I don't recall.

2697

Q. Is your memory very clear about the introductions or are you a little uncertain about that? A. No; I think I am—

Q. Can you tell us, please, when you went to Hawthorne for that year? A. It was the Summer time, I know that. I think it was the Summer of 1931.

Q. You say you stayed there for one year, right? So that you came out when? Summer time of 1932? A. Yes; I stood there for 13 months, now that I remember.

Mr. McGough: All right.

2698

By the Court:

Q. You lived in the Bronx when this was supposed to have happened, this introduction? A. Yes, sir.

Q. Were you married at that time? A. Yes, sir.

Q. Where did Rudish live at that time? A. I think he lived in Brooklyn.

Q. Rudish lived in Brooklyn, is that so? A. I think he lived in Brooklyn.

2699

Q. What were you doing on 8th Street between Avenue C and D? A. Nothing in particular, I mean—

Q. What were you doing there? A. Just walking around there.

Q. Where was it you met Rudish? A. I met him on 8th Street.

Q. What were you doing on 8th Street? A. I was downtown that night. I have a lot of friends downtown.

Q. Just happened to meet him? A. Just happened to meet Rudish.

2700

Q. Where did you meet him? A. On 8th Street, middle of the block some place.

Q. Doing what? A. Just standing there.

Q. Standing talking to somebody? A. Yes.

Q. To whom? A. I don't know whom he was talking to.

Q. You were all alone? A. I was by myself.

Q. Where were you bound for? A. I was bound for the East River Drive. Just going to walk up there.

Q. Talk louder. A. I was going to walk through 8th Street and up to the Drive, and I

2701

walked in the direction of East River Drive, and I happened to bump into Mr. Rudish on the block.

Q. Just took a walk with him? A. I did not walk with him.

Q. He walked down to Avenue D and turned right and went down to 7th Street where the candy store is on. Just walking with him? A. Yes.

Q. Taking a walk? A. Yes.

Q. Just spending the evening down on the East Side? A. I am down there three or four times a week.

2702

Q. If I am clear you were married and lived up in Intervale Avenue at the time? A. Yes.

Q. That is up in the Bronx? A. Yes.

The Court: Any redirect?
Mr. Meadow: Yes.
The Court: Proceed.

Redirect examination by Mr. Meadow:

Q. Did you have many friends down in what is known as the East Side, the section that we are talking about, down at 7th and Avenue D? A. Yes.

2703

Q. Was it your habit to go down in this section known as the East Side many evenings during the week? A. Yes.

Q. Would you say that you spent at least three or four evenings out of the week down on the East Side? A. About three or four days a week.

Q. When you say you went to Hawthorne, how old were you when you went there? A. I was fifteen.

Q. Now, were you—

The Court: That may not be considered by the jury on the question of credibility, against this witness. That is not a conviction of crime.

Mr. Carabba: The District Attorney brought it out.

By Mr. Meadow:

Q. Did you formerly live in what is known as the East Side of New York? A. That time?

2705 Q. At any time did you live in that neighborhood known as the East Side of New York at any time in your life? A. No.

Q. Did you go down there frequently? Did you have numbers of friends down there? A. Yes.

By the Court:

Q. Who was it you knew at 8th Street? A. There are a few boys I knew there.

Q. Who were you with there that night on 8th

2706 Street? A. I was by myself.

Q. Where did you start walking—from where to where—when did you leave your house that night? A. I don't remember the time.

Q. Where did you land when you got down to the East Side? A. I landed on 7th Street; I always land on 7th Street and Avenue C.

Q. You walked to 8th Street? A. Yes; there is a candy store on 7th Street where a lot of my friends are.

Rubin Jalkover—For Deft. Rudish—Recross 2707

Recross-examination by Mr. McGough:

Q. Did you ever go out on stickups? A. No.

Q. You say you never went out with Davie Yellin on hoists? A. No, sir.

Q. Know what a hoist is? A. Yes.

Q. What is it? A. Supposed to be a holdup.

Q. Did you ever go out on holdups with Davie Yellin? A. No, sir.

Q. Did you ever work in the Garment Center? A. For a little while, yes.

2708

Q. When? A. 1940, 1939.

Q. Whom did you work for up there? A. Gem Novelty.

Q. Where is it located? A. 242 West 36th Street.

Q. West 36th? A. Yes.

Q. You are known as a tipster on the East Side; isn't that right? A. No, sir.

Q. You know what a tipster is? A. Yes.

Q. Tell the Court and jury what a tipster is? A. Somebody that tells somebody something.

2709

Mr. Carabba: Objected to as incompetent, irrelevant and immaterial, not proper cross-examination.

The Court: Overruled.

Mr. Carabba: Exception.

By Mr. McGough:

Q. Tell us what you mean by tipster? A. Somebody that tells somebody something—I don't know.

2710 Q. You mean somebody tells somebody else where there is some money or payroll? A. It could be anything.

Mr. Carabba: I object to the District Attorney saying "You mean this" and "You mean that". I object to his telling the witness what he means.

The Court: This is cross-examination.

Mr. Carabba: Exception.

2711 By Mr. McGough:

Q. Will you sit back, please, and take a deep breath, and tell me whether or not you are a tipster on the East Side; yes or no? A. No, sir.

Q. Have you ever been a tipster? A. No.

Q. Has Yellin ever been a tipster? A. I don't know, sir.

Q. Has Yellin ever been a hoist man? A. I don't know, sir.

Q. Did you ever go out on jobs with Slip Spielfogel? A. No.

2712 Q. Did you ever ride in a car with they were in the car? A. No, sir.

Q. Did you ever have a gun in your hand? A. No, sir.

Q. Have you ever held a job for more than two or three weeks at a time anywhere? A. Yes, sir: Navy Yard.

Q. What was the reason you left the Navy Yard?

Mr. Carabba: I submit that is already answered on cross-examination by the District Attorney.

The Court: He may ask him again.

A. I took more essential work. The work I was doing was not so essential; the new job I had was more essential.

By Mr. McGough:

Q. The work in the Navy Yard was not essential? A. Work I had to do was not essential.

Q. I ask you again, were you ever convicted of a crime? A. The only crime I was convicted of was disorderly conduct.

2714

Q. Did you ever have a gun in your hand? A. No, sir.

Q. You swear now you never went on jobs with Yeilin? A. No, sir.

Mr. Carabba: I object to this and ask—

The Court: Disorderly conduct is not a crime; except if it is disorderly conduct of a certain kind, it may be called to the attention of the jury.

By the Court:

2715

Q. Were you ever convicted of jostling? A. No; it was a strike. We were picketing.

Q. It was not jostling? A. I don't know what jostling means.

The Court: Then it is of no moment on his credibility, the conviction of disorderly conduct; does not affect credibility in the slightest degree.

Mr. McGough: That is all.

The Court: It is not an offense involving moral turpitude.

2716 *Sidney Rudish—Fo. Deft. Rudish—Direct*

Mr. Solovei: I have no questions to ask this witness except I want to address myself to the Court. I would ask your Honor now to instruct this jury that the questions asked by the District Attorney of this witness, "Didn't you do this?" and "Didn't you do that with Yellin" does not mean, by the widest stretch of the imagination, that this young witness here ever did. It is not evidence; it must
2717 not be considered by them that anything like that ever transpired.

The Court: The jury is so instructed. The District Attorney is bound by the answer.

Mr. McGough: That is the rule. I know it.

The Court: In other words the witness's answer stands. That is plain, isn't it? All right. Next witness.

2718 SIDNEY RUDISH, residing at 402 East 4th Street, New York City, called as a witness in his own behalf, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. Meadow:

Q. Are you a defendant in this action? A. Yes; I am.

Q. How old are you? A. I will be 29 this July.

Q. Are you married or single? A. Married.

Q. When were you married? A. August 10, 1935.

Q. Do you have any children? A. Yes.

Q. How many children do you have, and give their ages? A. Three. I have got a son, five years old, got two daughters, one three years old and the other one is a year and a half.

Q. Were you ever convicted of a crime? A. Yes; I was.

Q. First, will you please tell us what the crime was? A. I was convicted of assault in 2720
the third.

Q. Were you sent to prison for that? A. No; I received a suspended sentence.

Q. Were you convicted of any other crime? A. Yes; I was.

Q. Please keep your voice up? A. I was.

Q. What was that crime? A. That was unlawful entry.

Q. Did you receive any sentence in reference to that crime? A. Yes; I did.

Q. What was the sentence? A. Three months.

Q. Where were you incarcerated for the pe- 2721
riod of three months? A. First I went to Riker's Island, and from there I was sent up to Hart's Island; from Hart's Island I was sent down to the Tombs, and that is where I finished my time.

Q. Were you convicted of any other crimes other than the two crimes you have just told the jury? A. No, sir.

Q. Never convicted of a felony? A. No, sir.

Q. Do you know the defendant Indovino? A. Never saw him.

2722 *Sidney Rudish—For Deft. Rudish—Direct*

Mr. Meadow: I withdraw that question.

Q. Prior to October of 1942, when you were arrested by the police in connection with this crime, did you know the defendant Indovino? A. Never saw him in my life.

Q. When was the first time that you saw the defendant Indovino in your life? A. The first time I saw him, we were booked at the Bath Beach station.

2723

Q. Now, when was that? A. That was Tuesday morning, October 26th.

Q. What year? A. 1942.

Q. Now, will you tell us when you were arrested in connection with this crime and where you were at the time, and if you know, who arrested you? A. I was employed by William Wise on 5th Street and Avenue D, New York City. The officers that arrested me I don't know. They came in and told me that I was—I did not give my address down in the Selective Service, and that is why they wanted me; they

2724 said they were from the F.B.I.

Q. Where did they take you? A. They had a car parked on 4th Street between Lewis and Avenue D; put me in the car; they told me they were going down to Foley Square. When they reached Foley Square, they turned over the Brooklyn Bridge, and then to the Hotel Bossert.

Q. When you were taken to the Hotel Bossert did the detectives then tell you you were under arrest? A. No; they did not.

Q. Did they question you there as soon as you got to the Hotel Bossert? A. No; I must have

waited about an hour before they told me what I was there for.

Q. Did they tell you then that they were arresting you in connection with this crime? A. No. They first started to show me pictures.

Q. Did they then show you the picture of the defendant Indovino? A. No; the first picture they showed me was of Abraham Beitler.

Q. Did you recognize the photo of Abraham Beitler? A. I did.

Q. Did you answer every question in reference to Abraham Beitler? A. I did. 2726

Q. Had you spoken with Abraham Beitler within five years prior to the date of your arrest? A. No.

Q. Had you seen Abraham Beitler five years prior to your arrest? A. No, sir.

Q. Was Abraham Beitler a friend of yours? A. Never was.

Q. Did you ever have any lengthy conversations with Abraham Beitler in your life? A. Never.

Q. Was he just one that you knew to say "hello" to, or not even that well known acquaintance? A. He was a casual acquaintance. 2727

Q. That is, you saw him around the East Side, is that it? A. No; did not see him around the East Side.

Q. All right; where did you see him? A. Hawthorne School.

Q. Did you ever see him after that? A. A few times when we went down to report to the Jewish Board of Guardians, 220 East 19th Street.

Q. Did you ever speak with him at any length when you saw him down there? A. No, sir.

Q. Did you ever see him at any other place in your life after Hawthorne? A. No, sir.

Q. Did you speak with Lieutenant McNally at the Hotel Bossert in reference to this case? A. I did not.

Q. Did you speak to Lieutenant McNally at the Bath Beach station in reference to this case? A. He questioned me outside in the hall and was
2729 telling me about being a material witness in the case.

Q. What did you say to him? A. I told him I would not be a material witness in the case because I don't know anything about it.

Q. You heard Lieutenant McNally take the witness-stand and say, did you not, that you said to Lieutenant McNally, "Ask Davie Yellin about whether I had anything to do with this case"? A. I told him to bring Davie Yellin down from Sing Sing and he can prove that I did not have anything to do with Malinsky or anything con-
2730 cerning the crime.

Q. Now, were you ever in Coney Island in the winter time in your life? A. Never.

Q. Have you ever eaten or been in the Cosmo Restaurant in Coney Island in your life? A. Never heard of it and I don't know where it is situated.

Q. Now, you sat here and heard Davie Yellin—

The Court: Never mind. Don't ask him to characterize any other witness's testimony. Have him testify for himself.

Never mind what he heard some other witness say. Go ahead.

Mr. Meadow: I am not going into the merits.

The Court: Just ask him. The question is improper as to form.

By Mr. Meadow:

Q. Did you meet Davie Yellin on February 15, 1941, at approximately—that should be February 16th at approximately one a. m. in a candy store on 8th Street between C and D, if you know? A. I did not. 273

Q. Now, did you tell Davie Yellin that evening or morning, rather, of February 16, 1941, that you just came back from a trick and a cop was killed? A. I did not.

Q. Did you ever say anything to Davie Yellin in your life that you came back from a trick and a cop was killed? A. I did not.

Q. Did you ever discuss a murder of a policeman by the name of Fox— A. I did not.

Q. With Davie Yellin? A. I did not. 273

Q. Or did you ever discuss with Davie Yellin the murder of any policeman? A. I did not.

Q. Now, did you ever have on a lumberjacket, at approximately February 16th, 1941, which was black, and have a zipper on it, and have it zipped up to your collar; and have two pockets on the side and have in it two objects that bulged out; and say to Davie Yellin that "I have the pieces" and "I must duck the pieces"? A. I did not. I never owned a black lumberjacket.

By the Court:

Q. You did not know Yellin at that time, did you? A. I did know him.

By Mr. Meadow:

Q. You knew Yellin, didn't you? A. Yes; I did.

Q. Did you know the defendant Malinsky in February of 1941? A. Never saw him before in my life.

2735

Q. When you say before, before when? A. The first time I saw him was in March, March or April of 1941.

Q. Now tell us when and where you met the defendant Malinsky and who introduced you? A. David Yellin introduced me to Malinsky on 7th Street and Avenue D.

Q. Give us, please, who was present and approximately the conversation had at that time in reference to the introduction? A. Well, it was just like the witness that was on here before stated.

2736

Mr. McGough: Object to that and I move to have it stricken out.

The Court: Stricken out.

A. I was on 8th Street between C and D, by the candy store standing there talking to a few women and a few people there, and Jalkover came over and I started to talk to him. Then I said, "Let's take a walk." We went to take a walk.

By Mr. Meadow:

Q. Don't go so fast. Just go slowly. Give it to us slowly. A. I had intentions of seeing my sister who lives at 24 Avenue D, between 3rd and 4th Streets; and I figured on walking down towards that way; and Jalkover accompanied me on the way. We stood on the corner of 7th Street and Avenue D, so this witness Davie came out of the candy store with Spielfogel and Malinsky and introduced us. He said, 2738
"Here is Jake, this is Slip, and this is Moish." And that is all there was to it—just said "Hello" and that is all.

Q. What did you say? Did you say anything at that time? A. I just said "Hello" and nothing else.

Q. Prior to February 15, 1941, had you ever discussed with the defendant Indovino or the defendant Morris Malinsky a payroll stickup in Coney Island where a cop would be a soft touch? A. I never said any such thing, and I did not go out on any kind of stickups or holdups of 2739
any sort.

Q. Never discussed it with these defendants? A. Never.

Q. Or ever had any discussion as to where to get rid of the pieces? A. Never had any such discussion.

Q. Did you have any pieces on you on February 15th or 16th, 1941? A. I never did.

Q. Now, do you know anyone by the name of Sam Sonenblick? A. No, sir.

Q. Did you ever head of that man before in

your life prior to the day that he came and testified here in court? A. No, sir.

Q. Did you ask Malinsky for the address of Sam Sonenblick? A. I have never asked no Malinsky; never had any address.

The Court: Spielfogel.

Q. Did you ever ask Slip for the address or phone number of his uncle, whose name was Sam Sonenblick? A. I never even knew he had an
2741 uncle.

Q. Did you on February 15, 1941, go to Fulton and Pine Streets in Brooklyn? A. I don't know where it is and I never was there.

Q. Did you go to Brooklyn at all on February 15, 1941? A. I did live in Brooklyn at that time.

Q. When did you first live in Brooklyn? A. I moved there from 8th Street, New York City, somewheres around December of 1940.

Q. And did you live there with your wife and children? A. I did.

Q. And in relationship to the conversation or
2742 introduction between Malinsky and yourself, was that before or after you lived in Brooklyn? A. After I lived in Brooklyn.

Q. When did you cease living in Brooklyn? A. Somewheres around March.

Q. Of what year? Let us have the year. A. 1941.

Q. You say now definitely you remember the introduction to be subsequent to that? A. The introduction took place about two weeks after I moved into New York again.

Q. Did you ever talk to Spielfogel about a murder in Coney Island? A. Never did.

Q. Did you ever speak to Spielfogel or say to Spielfogel that you had committed murder in Brooklyn? A. I did not.

Q. Did you say that you had been on a job when murder had been committed? A. I did not.

Q. Or a cop was killed? A. I did not.

Q. Did you say to him that you were in Brooklyn or in Coney Island when a cop by the name of Fox was killed? A. I did not.

Q. Did you see Spielfogel in either the Hotel Bossert or the Bath Beach station house? A. I 2744
seen Spielfogel in the Hotel Bossert.

Q. Tell us what happened when you saw Spielfogel and when Spielfogel saw you? A. Detective McNally—

Mr. McGough: I object.

The Court: Wait a minute. Did Spielfogel testify to anything concerning this defendant at the Hotel Bossert?

Mr. Meadow: I believe so, your Honor, yes, I believe so.

Mr. McGough: I don't recall, Judge.

The Court: Will you point that out to 2745
me, Mr. Meadow? If that has been testified to I will let you ask this question, but if Spielfogel did not mention him as being in the Hotel Bossert or having any contact with him, I will sustain the objection.

Mr. Solovei: I don't really recall any conversation.

Mr. Carabba: Just a spontaneous remark. I don't think there is any conversation.

Mr. Meadow: My recollection is that there was such testimony given by Spielfogel.

The Court: Point it out to me yourself. You have the minutes before you.

Mr. Meadow: Your Honor, I urge it on the further ground—

The Court: Point out that point to me. If you have it, then we will go to the other matters. I don't recall Spielfogel saying anything about this particular defendant in the Hotel Bossert. I may be in error.

Mr. Meadow: I think, your Honor, for convenience, it would be better to refer to it subsequently because of the fact that it will take time to go through the minutes.

The Court: Are you just about finished with this witness?

Mr. Meadow: No, your Honor.

The Court: You have more testimony?

Mr. Meadow: Oh, yes.

The Court: About how much longer do you expect to take?

Mr. Meadow: I would say an hour.

The Court: I think we will take a recess now for luncheon. Gentlemen of the jury, we are about to take a recess for luncheon. Please do not discuss the case among yourselves or with any other person, or permit anyone to speak to you about this case or discuss it in your presence. You must keep your minds open: do not form or express any opinion or conclusion as to the guilt or innocence of the defendants or either of them, or any of them, until the case has been submitted to you for your consideration after a charge by the Court. You may retire and return at two o'clock.

2749

AFTER RECESS. TRIAL CONTINUED.

SIDNEY JACOB RUDISH, resumed.

Direct examination by Mr. Meadow (continued):

Mr. Meadow: If your Honor pleases, that testimony I referred to is on pages 320 and 321 of the record.

The Court: I will look at it.

Mr. Meadow: When Spielfogel was saying at the Bossert Hotel, when he was brought in front of the defendant Rudish.

2750

The Court: You are right. You may ask him those questions.

By Mr. Meadow:

Q. When you were arrested and brought to the Bossert Hotel, did there come a time when Spielfogel was brought in front of you? A. Yes, sir.

Q. Talk up, please. A. Yes, sir.

Q. And who else was present? A. Detective McNally.

2751

Q. And were any quesions asked by Detective McNally of Spielfogel in your presence? A. Yes, sir.

Q. Tell us what was asked and what were the answers. A. He brought Spielfogel in and he asked him; he said, "Do you know this fellow?" He said, "Yes, that is Jake." He says, "How long do you know him?" He said, 'One year". I didn't say anything all this time and he said, "Is that all you know about him?" He said, "Yes." He said, "Do you want your 30 to 60?"

2752 He turned around—Spielfogel turned around to McNally and he said, "Look, I was a nice fellow and came down here"; he said, "Leave me alone, I will do my 30 to 60."

Q. Who said that? A. Spielfogel.

Q. When the District Attorney asked, "Do you want your 30 to 60," who was he talking to? A. To McNally.

Q. When McNally asked the question, who was he talking to? When Detective McNally asked
2753 that question, "Do you want your 30 to 60", who was he talking to? A. To Spielfogel.

Q. Now, did you say to Yellin that, "I got over two bills here the night of February 15, 1941"? A. I said no such thing.

Q. The early morning of the 16th? A. I said no such thing.

Q. Did you say to Yellin then—

The Court: Do you desire to go over these items, item by item?

Mr. Meadow: There are only a few, I believe.

2754 The Court: You may, if you wish, but this man said he had absoluetly nothing to do with this Fox murder. He has said so unqualifiedly. He has testified that he knows nothing about it and had no part in it from its inception to the end. That is your testimony here, isn't it?

The Witness: Yes, sir.

Mr. Meadow: I understand there are so few questions, and that is the only reason I am going into it.

The Court: You may proceed in your own way.

By Mr. Meadow:

Q. Did you say to Yellin, to use these words, "I want to duck the pieces." A. I didn't say any such thing.

Q. Now the night of February 15, 1941, did you drive the automobile to Coney Island? A. I did not.

Q. Did you own an automobile at that time? A. No, sir.

Q. Did you steal an automobile on February 15, 1941? A. I did not steal any automobile at that time or ever. 2756

Q. Now did you met Beitler and Malinsky and go to Coney Island on February 15th? A. I did not.

Q. Did you ever meet Beitler and Malinsky and go to Coney Island? A. I did not.

Q. Were you ever at the Coney Island Theater in Coney Island? A. Never was there in my life.

Q. Did you ever go to the Citadel Club— A. No, sir.

Q. —in Manhattan? What was your answer to that? A. No, sir. 2757

Q. Did you ever split any moneys with anyone at the Citadel Club in Manhattan? A. No, sir.

Q. And more specifically, February 15th and 16th? A. No, sir.

Q. Now were you ever in an automobile that was parked on 12th Street, near a bank on the 15th day of February 1941, at approximately 11 p. m.? A. No, sir.

Q. Were you anywhere within the vicinity? A. No, sir.

Q. Were you questioned by the police after your arrest and were your answers substantially the same as you have testified to here? A. Absolutely so.

Q. Did you ever aid and abet and act in concert with Beitler, Malinsky and Indovino, or any other person, at Coney Island or any other place in the City of New York which resulted in the killing of Patrolman Fox on February 15, 1941? A. I have absolutely nothing to do with each of the men or anything with the crime.

Q. Now do you remember what you did on February 15th, the evening of February 15, 1941? A. I cannot recall the simplest thing.

Q. But you are sure that you were not at Coney Island, is that right? A. Absolutely.

Q. Does February 15th bring any recollection to your mind other than any other day? A. None whatsoever.

Q. You did not commit the crime or act in concert—

The Court: You have had that at least twenty times.

Mr. Meadow: This is the last question.

The Court: Making it the 21st time, does not add anything to it.

Mr. Meadow: I just want to ask it this time.

The Court: The man has said in plain English, "I don't know the first thing about this crime and never had any part in it."

Mr. Meadow: That is all.

The Court: Isn't that enough? If you have any additional question that you want to ask him, go ahead and ask it.

Mr. Meadow: That is all.

Cross-examination by Mr. McGough:

Q. Do you remember talking, Rudish, with Lieutenant McNally about Yellin? A. Yes.

Q. Asking the Lieutenant to bring down Yellin from Sing Sing? A. I do. 2762

Q. Where did that conversation take place? A. At the Hotel Bossert.

Q. You told the Lieutenant that if he brought Yellin down from Sing Sing, he could prove that you were not mixed up in the Fox case? A. Absolutely.

Q. Is that right? A. Yes.

Q. In other words, that Yellin would be able to prove that you were elsewhere than at Coney Island that particular night? A. Not necessarily that. He was the man that introduced me to Spielfogel and Malinsky, and he knows 2763 that I never associated with those two men in all my life.

Q. And when Yellin came down, Yellin had a talk with McNally, is that right? A. That I did not see and I did not hear.

Q. You were there when Yellin came in and faced you with McNally? A. That was not in the Hotel Bossert though; that was in the police station.

Q. That was sometime after he was brought down, is that right? A. I don't know what time it was. It was going towards the end.

Q. And they brought Yellin in and Yellin pointed to you and said substantially what he said here today? A. He did not point to me.

Mr. Carabba: I object to that, that Yellin substantially said something.

The Court: Objection sustained.

By Mr. McGough:

Q. I mean at this trial; Yellin and you faced each other when McNally brought him down? A. He just had a look at me and then told me to turn around, and then he told him the rest of the story and he did not look at me any more.

Q. Did he? A. Yes.

The Court: I sustain an objection to that even though counsel has not objected. I sustain the objection to that and ask the jury to disregard it even though the lawyers do not get up on their feet and object to it. Yellin's statement in this man's presence is not competent.

Mr. Carabba: I did not hear the answer.

The Court: Yellin's statement in this man's presence, while he was under arrest in the station house, is not binding on him under the law, and you gentlemen will follow the law as I lay it down. Gentlemen of the jury, do not make any mistake about it, and even if the lawyers do not object, the Court will object.

By Mr. McGough:

Q. Did you tell us this morning that you never owned a black lumberjacket? A. That is right.

Q. Did you ever own any kind of lumberjacket? A. I do.

Q. At the time you were arrested you had a lumberjack? A. That is right.

Q. Is that right? A. Yes.

Q. What color was that? A. Green and yellow.

2768

Mr. Meadow: I think it may be necessary to call another witness who is now present in the courtroom, and since we have moved for the exclusion of the witnesses, I think it proper to let that witness be excluded at this time.

The Court: Who is that?

Mr. Meadow: That is the defendant's father, Mr. Rudish.

The Court: Let him step out.

(Mr. Rudish steps out of the courtroom.)

2769

By Mr. McGough:

Q. Was that the lumberjack that you were wearing at the time of your arrest? A. That is right.

Q. Will you describe that lumberjack to the jury, please? A. Well, it is torn and is an old jacket, and it has got two slit pockets here with zippers on it. It has got two pockets over here without any zippers on it, and it zippers all the way up.

2770

Q. And on February 15, 1941, did you own that lumberjack? A. I did not.

Q. You say that at the time of the arrest it was an old torn one? A. Yes.

Q. And you did not have it on the 15th of February 1941? A. No, sir.

Q. How long did you have it? A. It was a little before when I was arrested. I would say, about five or six weeks.

Q. And at the time of your arrest, it was all
2771 worn out and it was torn? A. That was the way I received it.

Q. You mean, you did not buy it new? A. No, sir.

Q. Where did you get it from? A. My father.

Q. Now at the time of your arrest, were you working? A. Yes, sir.

Q. Doing what? A. Sir?

Q. Doing what, please? A. I was an automobile mechanic.

Q. Where were you working? A. On 5th Street and Avenue D, New York City.

Q. How long had you been working there? A.
2772 I was working there three weeks prior to my arrest.

Q. What was the boss' name? A. William Weiss.

Q. Did you have a job before that? A. Yes, sir.

Q. Where? A. Same boss.

Q. Where? A. Same place.

Q. Same location? A. That is right.

Q. I thought you said you only worked there three weeks before your arrest? A. Yes, in between that time, I went to Newfoundland.

Q. I beg pardon? A. I went to Newfoundland.

Q. Took a trip to Newfoundland? A. I went for work. I did not take a trip.

Q. Where is Newfoundland? A. It is all the ways over past Nova Scotia.

Q. A sea voyage, is that what you mean? A. It was not exactly that. I applied for a job and I was taken on.

Q. And you went there by boat? A. That is right.

2774

Q. How long were you in Newfoundland? A. About three weeks.

Q. Did you obtain the work? A. Partly.

Q. Beg pardon? A. Partly.

Q. When did you go to Newfoundland, Rudish? A. I made negotiations while I was working for my former employer, Mr. William Weiss, and I had to get inoculations.

Q. Tell us the time; what date? A. I don't remember the exact date.

Q. Do you remember what year it was? A. Yes, 1942.

2775

Q. What time of the year? A. Somewheres around a little before—around September or something like that; August or September.

Q. Now where did you work before you made that trip? A. William Weiss.

Q. Down at Avenue D and 5th Street? A. That is right.

Q. How long were you with Weiss? A. About three weeks before that.

Q. Where did you work before that? A. Before that?

Q. Yes. A. I worked in Niagara Falls.

Q. Where? A. Niagara Falls.

Q. What is the name of the firm? A. M. Shapiro & Sons.

Q. How long were you up there? A. I was up there about a month until I got called down by the Selective Service.

Q. Do you remember the date? A. During the summer.

Q. What year? A. 1942.

Q. And where did you work before that? A. I worked over in Jersey; John A. Johnson
2777 Construction.

Q. Whereabouts, please? A. In New Camp Kilmer.

Q. What kind of work did you do for that company? A. Which one is that? Kilmer? Laborer.

Q. How long were you over there? A. About a week.

Q. Where did you work before that? A. Before that, I had my own store.

Q. Located where? A. 7th Street, between Avenue D and Lewis Street.

2778 Q. You mean, a regular store where people would come in off the street or down in a cellar? A. Off the street.

Q. What kind of a store did you run there? A. Under the name of Jack's Auto Repairs.

Q. What was the landlord's name? A. Mr. David Lipple.

Q. Did you pay rent? A. Yes.

Q. How long were you there? A. About five weeks.

Q. You had your own store down there on 7th Street? A. Yes, sir.

Q. Between D and Lewis, about five weeks? A. Yes, sir.

Q. When was that? A. That was in 1941; around September.

Q. Now between September 1941, and the time you went to Camp Kilmer, were you working? A. I had various jobs in between.

Q. Did you ever have a machine shop at 376 East 8th Street? A. I kept my tools down there.

Q. Down in the cellar? A. That is right.

Q. Did you ever keeep any guns down there? 2780
A. Never.

Q. Did you have two hammerless .38 caliber guns down in the cellar? A. No.

Q. Did you have two Spanish side-throwers, .32's? A. Never did.

Q. Did you have one .38 hammerless, .38 caliber? A. No, sir.

Mr. Carabba: I object to this line of cross-examination unless the District Attorney intends to support his questions: "Did you have this and did you have that." 2781

The Court: He says "No", and he is bound by the answer.

Mr. Carabba: What is that, Judge?

The Court: The District Attorney is bound by the witness' answer.

Mr. Carabba: Yes, I know that.

By Mr. McGough:

Q. Isn't it a fact, Rudish, that you and Spielfogel and Yellin had a gun range down in

the cellar of that particular house? A. Not that I know of.

Q. Didn't you have a target up in the rear of the cellar? A. No, sir.

Q. Do you mean to say that you never saw a gun fired in the cellar? A. No, sir.

Q. Did you ever fire a gun down there? A. No, sir, never handled a gun.

Q. When was it that you had your shop in that cellar? A. It has been there quite a long
2783 time.

Q. Can you give us the times when you went there and when you left? A. It dates back to about 1936.

Q. And when did you quit there? A. The only time I ever remember quitting there was the time I moved to Brooklyn.

Q. What is the date? A. Somewheres in December.

Q. I beg pardon? A. 1940.

Q. You had your machine shop there from a period in 1936 down to the end of 1940? A.
2784 That is right.

Q. What was the landlord's name? A. I don't know the landlord's name.

Q. Was his name Phil? A. He was not the landlord.

Q. Did Phil have a store on the first floor? A. He was one of them.

Q. Did you pay your rent to him, $5 a month? A. Paid him once in a while $5 a month.

Q. Isn't that the building where the witness Yellin lived? A. That is right.

Q. And there was a card game in that particular candy store every Saturday night, wasn't

there? A. Well, a few times there were card games there.

Q. You played occasionally, did you not? A. I did.

Q. Do you recall being there on Saturday night, the 15th of February? A. I do not.

Q. What? A. I do not.

Mr. Meadow: I object to that question. He should ask him whether he was there or not.

2786

The Court: Put the question in that form.

By Mr. McGough:

Q. Were you there at all that night at that particular candy store? A. I was not.

Q. You are sure of that? A. Absolutely.

Q. When you told McNally that Yellin could prove you were innocent, did you have in mind anything that took place at the candy store? A. I had in mind the time he met me, and Malinsky and Spielfogel.

2787

Q. You did not tell that to McNally, though? A. No, he did not give me the chance.

Q. You did not tell that to Mr. Heffernan? A. No.

Q. You did not tell that to the Magistrate on the arraignment, did you? A. No. I did not get a hearing in fact to say anything.

Mr. Meadow: I object to the question and my recollection is that the arraignment was postponed and there were—

The Court: He said he did not have

a hearing, so the witness made it clear he had no opportunity to say anything.

Q. So that the first time you told that to any law-enforcement agent or official was here at the trial, is that right? A. That is right.

By the Court:

Q. Did you have any trouble with Yellin? A. No.

Q. Did you ever have any argument with Yellin? A. No.

Q. Or any dispute with him? A. No.

Q. Or any angry words with him? A. Never.

Q. Does he owe you any money or do you owe him any money? A. I was supposed to be very good friends, and his family.

Q. In other words, you consider yourself still a good friend? A. I do. At least I believe up to this time he was.

By Mr. McGough:

Q. You told us you were convicted twice, is that right? A. That is right.

Q. First was back about 1934, is that correct? A. Right.

Q. A simple assault arising out of a rape case? A. That is right.

Q. And the unlawful entry conviction, that was in 1938, is that right? A. That is right.

Q. Did you go to trial or did you plead guilty?

Mr. Carabba: I don't see that it makes any difference.

The Court: Objection sustained.

2791

By Mr. McGough:

Q. Was it originally a burglary charge? A. That is what they charged me with.

Mr. Carabba: I object.

The Court: Objection sustained.

By Mr. McGough:

Q. Do you know a girl named Anna Palimenterri? A. Who?

2792

Q. Anna Palimenterri? A. No, sir.

Q. Never heard of her? A. No, sir.

Q. Do you remember meeting her in the Bronx in May of 1941?

Mr. Carabba: That is objected to.

The Court: Objection sustained as to form. Ask him if he did meet her.

By Mr. McGough:

Q. Did you meet that girl in the Bronx in 1941, in the month of May? A. I don't remember. Your Honor, may I ask you something?

2793

The Court: No, just answer the questions of the District Attorney.

Q. Were you at Hunts Point and Old Point in 1941? A. I refuse to answer that question.

Q. You do not like to answer that question? A. No, sir; that has nothing to do with this case.

Q. You have heard of that girl, haven't you? A. I will not answer.

Q. Well, tell me this; maybe you can answer this one. Were you ever in the Melrose Cafeteria? A. Absolutely.

Q. Tell the Court and jury where it is located. A. 7th Street and Avenue C, between 7th and 8th Streets on Avenue C.

Q. You have been in there a number of times, have you? A. Up until the time I was arrested.

Q. You were in there once with Indovino; do you remember that? A. Never.

Q. Another couple of times with Malinsky? A. Never.

Q. You are sure you were never there with Indovino? A. Absolutely.

Q. How about the bar and grill down at Houston Street? A. Never was there.

Q. Do you know where it is? A. I don't know it.

Q. Do you know about the place? Have you ever seen it? A. I know Houston Street but I don't know the place.

Q. Are you familiar with the vicinity of Broome and Attorney Street? A. Yes, sir.

Q. How far would that be from your home when you are living in New York? A. I believe it would be about eight or nine blocks.

Q. Did you ever see Indovino in that neighborhood? A. No, I never stood around that neighborhood.

Q. What? A. I was never around that neighborhood.

Q. Who was there, you or he? A. I never seen him and I was not around that neighborhood.

Q. If you were never down there, you would

not know if he was? A. I wouldn't say that I do.

Q. Did you go with Mrs. Spielfogel to Malinsky's house? A. Did I go to Malinsky's house?

Q. With Mrs. Spielfogel. A. That was a little recent.

Mr. Carabba: May I have the time mentioned here by the District Attorney? Did you go; let us have the month and year, 2798
please.

Mr. McGough: I am asking him; I don't know.

The Court: Proceed. Ask him a question and then we will fix the time.

Mr. McGough: Read him the last question.

(Question repeated by stenographer as follows: "Q. Did you go with Mrs. Spielfogel to Malinsky's house?")

The Witness: I went to Brooklyn with her but I don't know where he lived.

2799

By Mr. McGough:

Q. Did you go by automobile? A. No, by trolley car.

Q. Did you go in the house? A. No.

Q. Do you know who lived in the house at the time you were there? A. I didn't even see the house.

Q. You mean, you stayed a distance away? A. I stood right where the trolley car was, right on the corner.

2800 *Sidney Rudish—For Deft. Rudish—Cross*

Q. And did she go out of sight? A. Yes, that is right.

Q. Did she come back and meet you and then go back to New York with you? A. Yes, sir.

Q. Did you have a talk with her? A. She started talking to me.

Q. Did you have a talk with her? A. No, she talked to me.

Q. Did you mention the Fox case? A. No, sir.

Q. Never mentioned about this case? A.

2801 No, sir.

Mr. Carabba: May I ask your Honor, please, at this time to instruct the jury that all the questions that the District Attorney asked of the last witness with reference to a gun, with reference to firing a gun, with reference to having a pistol range, is not evidence in this case.

The Court: They are so instructed and they will disregard the questions as not evidence.

Mr. McGough: That is all.

2802

By the Court:

Q. Were you working on February 15, 1941? A. No, sir.

Q. How long had you been out of work? A. Your Honor, I was on Compensation.

Q. How long had you been out of work? A. I just fell out of work at that time.

Q. Well, how long had you been out of work? A. Since November 11th.

Q. Since November 11th? A. 1940.

2803

Q. You were out of work from November 11th until when? A. Up until—

Q. Until what month? A. Until March 1941.

Q. Until March? A. Yes.

Q. So on February 15, 1941, you were out of work? A. Yes.

The Court: Step down.

Redirect examination by Mr. Meadow:

2804

Q. Were you getting compensation checks during that period? A. Yes, sir.

Q. Were you injured? A. Yes.

Q. And were you unable to work on February 15, 1941, due to that injury?

Mr. McGough: That is objected to.

The Court: Objection overruled.

The Witness: Yes, sir.

By Mr. Meadow:

2805

Q. What type of an injury was it that you were getting paid compensation for? A. I fell off a truck on my back and hurt my pelvis.

Q. And were you incapacitated in the hospital for any length of time? A. I was in the Manhattan and General Hospital.

Q. After that, how long were you incapacitated completely by reason of the injury you just testified to? A. Up until the time in May.

Q. Of 1941? A. Yes, 1941.

Mr. Meadow: That is all.

2806

By the Court:

Q. When did you get out of the hospital? A. Three weeks after I was injured.

Q. When? A. That would be about in December.

Q. You were out from the hospital in December, is that right? A. Yes.

Q. December of 1940? A. Yes.

2807

The Court: Proceed.

Mr. Meadow: That is all.

The Court: Step down.

Mr. Meadow: I will call the elder Rudish now.

JOSEPH RUDISH, residing at 200 East 6th Street, Manhattan, New York City, called as a witness for the defendant Rudish, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

2808

Direct examination by Mr. Meadow:

Q. Are you the father of the defendant, Sidney Rudish? A. Yes.

Q. Did you ever give to your son in the last two or three years a lumberjack? A. A jacket?

Q. Yes. A. Yes.

Q. Could you tell us when you gave that to him? A. It was a year ago before he went North where he was supposed to get a job by the

company so he come in and he said it was very cold. I said, "I got a good jacket for you."

Q. Speak up and speak slower. A. I cannot talk any louder. That is the best what I can do. I said before he went up on the North side where he was supposed to get a job from a company, so he came over to me and said, "I am going away. It is very cold in the place where I am going", so I said, "I got a good leather jacket what I bought off a man in Third Avenue and you can have it." 2810

Q. Did you buy that jacket second-hand? A. Yes.

Q. What condition was that jacket in when you gave it to him? A. It was a old ragged jacket.

Q. Did you say,—if I said to you, that it was a short period prior to the defendant Sidney Rudish's arrest, would that refresh your recollection? A. I cannot hear you.

Q. Was it a short time prior to when your son was arrested? 2811

The Court: Do you think this man understands the word "prior"?

The Witness: I do understand very good.

The Court: Before?

The Witness: Before. But I cannot hear very good.

By Mr. Meadow:

Q. About how long before your son was arrested, did you give him the jacket? A. I think about six or seven months before.

2812

Mr. Meadow: If your Honor pleases, at this time we do not have the exhibit here, the jacket, that we are all discussing, and I wonder if the District Attorney will consent that the jacket is the jacket that the defendant was wearing at the time of his arrest. We do not have it here for evidence.

The Court: Where is it?

Mr. Meadow: It is in Raymond Street,

2813

your Honor.

Mr. McGough: We have no control over it, Judge.

The Court: What do you want me to do?

Mr. Meadow: I can send for it and then recall him, if there is any necessity. I am not quite certain—

The Court: We can have it brought here tomorrow morning.

Mr. Meadow: All right.

The Court: Any questions by the District Attorney?

2814

Mr. McGough: No questions.

Mr. Carabba: That is all on behalf of the defendant Rudish, and the defendant Rudish now rests.

The Court: Rudish rests with the exception of having the jacket identified?

Mr. Carabba: Yes, with that reservation, and your Honor gives us permission to call that witness.

The Court: Yes. Call the next witness.

Mr. Solovei: Mr. Schoenberg.

Solomon C. Schoenberg—For Deft. Malinsky—Direct 2815

SOLOMON C. SCHOENBERG, residing at 956—50th Street, Brooklyn, New York City, called as a witness for the defendant Malinsky, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. Solovei:

Q. Mr. Schoenberg, you are a parole officer attached to the State Parole Board of the State of New York, is that correct? A. That is correct. 2816

Q. Have you with you the parole report of one Morris Malinsky? A. It is in the court at the present time.

Mr. Solovei: May I have the report, please?

Mr. McGough: Ask the witness.

By Mr. Solovei:

Q. Will you please look at the report of Morris Malinsky and will you please tell us when Morris Malinsky, the defendant in this case, was released from Elmira Reformatory? 2817 A. January 3, 1940.

Q. And you are now reading from an official report, which was just handed to you by the District Attorney, which covers the report of one Morris Malinsky, the defendant on trial here, is that correct? A. That is correct.

Q. Will you please, in looking at that report, tell us from the time he was released in January 1940 up to the present time, did he regularly report to the parole officer or parole board

by reason of the release from Elmira Reformatory?

Mr. McGough: I object to it. It is immaterial whether he did or not.

The Court: Objection sustained.

Mr. Solovei: Does your Honor have in mind why I am offering this?

The Court: Yes, I would like to hear you.

Mr. Solovei: There was testimony produced here by the people, who said, using their language, "He was on the lam", that he was a lammister, and that he wanted to make a getaway or runaway or hide, and I am offering this only for the purpose of showing that this defendant reported regularly to the Parole Board, and nothing else.

The Court: All right; I will let you do that.

Mr. McGough: If there is any testimony of being on the lam, it was testimony to the effect that Beitler was on the lam. There is no contention that there is any flight on the part of the defendant Malinsky.

The Court: I think there is.

Mr. Solovei: Yellin so testified, your Honor, and I will give you the exact language.

The Court: We will get the page of the record and look at it.

Mr. McGough: I think from Kovner, Judge, there was some conversation that he met Malinsky in March; that is right.

2821

The Court: That is right.

Mr. McGough: Under Kovner's testimony.

The Court: Then you withdraw the objection?

Mr. McGough: Yes.

The Court: Ask him, Mr. Solovei.

By Mr. Solovei:

2822

Q. Now, Mr. Schoenberg, will you please look at the paper that you have in your possession and tell me from that report whether or not the defendant Malinsky regularly reported to the parole officer by reason of his release from Elmira Reformatory? A. He reported regularly up until and including November 24, 1941—excuse me, just a minute; November 12, 1941.

Q. Will you please look and see whether or not he did not report after that up to the time that he was arrested in this case, in October 1942? A. He was arrested at that time for violation of parole.

2823

Q. Yes? A. And started to report again on November 29, 1941, and last reported on October 19, 1942.

Q. Now in reference to that violation of a parole that you called the Court's attention to, was that because of some Union strike? Will you look at your papers there, please. A. That was because of his arrest on November 22, 1941, for an assault and grand larceny charge.

2824 *Solomon C. Schoenberg—For Deft. Malinsky—Direct*

Q. That was arising out of a Union strike? A. Out of a strike.

Q. And that case was dismissed and you put him back on parole, is that correct? A. Correct.

Q. Now he was released January 1940, that is correct, is it? A. Yes.

Q. Will you please give us, in 1941, starting from February 1941, will you please tell this
2825 Court and jury how many times he reported to the Parole Board? A. He reported on February 15, 1941, February 26, 1941, March 12, 1941, March 26, 1941, April 9, 1941, April 30, 1941, May 14, 1941, May 28, 1941, June 11, 1941, June 25, 1941, July 9, 1941, July 23, 1941—

Q. Without calling them all off, he reported continuously, is that right? A. That is right.

Q. And the same thing you would say for 1942, is that right? A. That is right.

Q. And the same thing for 1940—that is 1942, up to the time he was arrested?

2826 By the Court:

Q. When did he report, in the p. m. or at night? A. The times are mentioned in each case.

By Mr. Solovei:

Q. Well, particularly as to February 15th.

By the Court:

Q. Yes, that is it. A. On February 15th, he reported at 5:52 p. m.

By Mr. Solovei:

Q. 5:50 p. m.? A. 5:52 p. m.

Q. Does that mean the time that he was actually interviewed or does that mean the time that he reported and probably remained there for a little while to be interviewed? A. There is no indication here as to what the time is. Usually it is when a man comes in and he never, unless, not never, usually does not stay more than five or ten minutes on an evening report. 2828

Q. And in the report that you have there, there are a number of places that the defendant from the time of his release in January 1940 from Elmira Reformatory, reported and showed where he was employed, is that correct? A. He stated where he was employed and employment visits were made.

Q. And the place that he stated where he was employed, did you in the regular course of your investigations visit the places where he claimed to have been employed? A. Places were visited by his parole officer. I was not his parole officer. 2829

Q. Well in the middle of February 1942, can you tell us from looking at that record where he claimed to have been employed and where the parole officer visited; I mean 1941?

Mr. McGough: That is objected to.

The Court: Objection sustained.

Mr. Solovei: Exception.

The Court: You may renew your offer later and I may reconsider the ruling.

Q. Now I am particularly referring to the month of February 1941. Can you tell us from

the report which you have, where the defendant Malinsky claimed to have been employed and whether or not the parole officer investigated that place to see whether or not he was employed there? A. He was working at 167 First Avenue for a Mr. Rouch; that was investigated and he was found there at work.

Q. Did he report at 80 Centre Street in the State Building? Yes, sir.

Q. That is the Parole Office? A. Yes.

Mr. Solovei: That is all.

The Court: Any cross-examination?

Mr. McGough: No cross-examination.

Mr. Solovei: I will call the defendant out of turn and send for the other man and put him on later.

The Court: All right.

MORRIS MALINSKY, residing at 714 Hinsdale Street, Brooklyn, New York City, called as a witness in his own behalf, being duly sworn by the Clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. Solovei:

Q. Now Malinsky, will you please talk up so I can hear you over here, please. How old are you? A. 24.

Q. Where were you born? A. Brooklyn.

Q. Did you go to Public School in the Borough of Brooklyn? A. Yes, sir.

Q. How high in school did you go? A. 8B.

Q. Graduate? A. Yes, sir.

Q. Did you go to High School? A. No, sir.

Q. After you left Public School, what did you do? A. I went to work.

Q. And did you live with your family? A. Yes, sir.

Q. What did your family consist of? A. I don't know what you mean.

Q. When you lived with your mother and father, who was home at that time when you went to work after you left Public School? A. My younger brother; my sister; my whole family; my three sisters and my brother. 2834

Q. Now are you married? A. Yes, sir.

Q. When did you marry? A. I got married June 6, 1942.

Q. And since your incarceration, your wife gave birth? A. Yes.

Q. You have one child? A. Yes, sir.

Mr. Solovei: May I have the statement?

Mr. McGough: I am handing Mr. Solovei Defendant's statement, People's Exhibit 13. 2835

By Mr. Solovei:

Q. Do you remember the 23rd day of October —I withdraw that. You were convicted of the crime of attempted robbery in Bronx County, is that correct? A. I was.

Q. And following that conviction, you were sent to Elmira Reformatory, is that correct? A. I was.

Q. Did you plead guilty to the crime in the Bronx? A. I did.

836 *Morris Malinsky—For Deft. Malinsky—Direct*

Q. How long did you stay there in Elmira Reformatory? A. From May 27, 1937, until January 19, 1940.

Q. And when you were released from Elmira Reformatory, what is the first job you had? A. I went to work—I come home Friday night and I went to work Monday morning for Mr. Rouch.

Q. And what kind of a place has Mr. Rouch got? A. It is like a novelty store, like a 5-and-10-cent store and I was a salesman for him.

837 Q. Where was that store? A. At 167 First Avenue, New York City.

Q. And how long were you employed there? A. I was employed for Mr. Rouch, well about up until March of 1941.

Q. Now when you left Mr. Rouch's place—I withdraw that— Did you leave Mr. Rouch's place of business for another job? A. For a better job.

Q. And where did you go to work after you left Rouch's job? A. The Grand Union Container Company.

Q. Where is that? A. It is on West 57th 838 Street, between 11th and 12th Avenues, New York City.

Q. How long did you work there? A. I would say up around until around June of 1941.

Q. And did you later on have another job? A. Then I used to work—I used to shape up on a job and I used to work one day or three days a week like that there and I kept doing that all during the summer of 1941.

Q. For about how long? A. For about three months. Then I went to work steady for John J. Casale.

Q. John J. Casale, Incorporated? A. Yes.

Q. Who was your immediate boss there? A. You see, the boss—I don't know how you explain it—

Q. Is that Casale Company— A. I was on Casale's payroll.

Q. —a trucking company, doing work for H. A. Johnson? A. That is right.

Q. And is there a man by the name of Bagnell in charge? He is a dispatcher.

Q. He is a dispatcher? A. District Manager, too. 2840

Q. And did you work directly under him? A. Yes, sir.

Q. I show you this paper and please tell this Court and jury just what this paper is.

Mr. McGough: I object to it; it is not in evidence.

The Court: Do you want to show that sometime in the latter part of 1941 he was working for somebody?

Mr. Solovei: That is after the summer of 1941 up to the time of his arrest. 2841

The Court: What has that got to do with the case? Suppose he was working every single day, does that prove or disprove that he committed a murder on February 15th?

Mr. Solovei: I take exception to your Honor's statement.

The Court: I am asking you.

Mr. Solovei: That means a whole lot. The man is employed and he is profitably employed and it means a whole lot.

The Court: I will let you prove it; go ahead.

The Witness: That is my identification tag at the bank where I cash my check. Without that, I could not cash my check.

Mr. Solovei: I offer that in evidence.

Mr. McGough: I object to it.

The Court: Objection overruled. I will take it for what it is worth. Mark it.

2843 (Paper received and marked Defendants' Exhibit 2.)

Q. What was your salary that you received at John J. Casale, Incorporated? A. My regular salary was $40 a week. I never made less than $50 a week. I made as high as $70 or $80 a week.

Q. At this place, where you were working? A. Yes, sir.

Q. And how long did you work for Casale? A. I worked until around September of 1941, until the day I was going to work and I was ar-
2844 rested.

Q. You were arrested on October 23, 1942, at about 7:15 a. m. while you were leaving your home, is that correct? A. That is right.

Q. Now when you were arrested, where were you taken to? A. To the Hotel Bossert.

Q. And when you were taken to the Hotel Bossert, who took you there? A. I was arrested by Detective James Bell and Detective McNally.

Q. And when you arrived at the Hotel Bossert, did you see any other detective or detectives there? A. Lieutenant James McNally.

Q. And will you please tell this Court and

2845

jury just what happened when you were at the hotel?

The Court: Are you going over the same ground as on the *voir dire*?

Mr. Solovei: I think I must do it.

The Court: Do you want to do it?

Mr. Solovei: I think it is compulsory.

The Court: It is in evidence. You are merely reiterating it and it does not give it more force. Do you want to go over the same ground as you went over the other day?

2846

Mr. Solovei: I do not want to go over it for the purpose of taking up time but I think under the law—

The Court: Time means nothing when a man's life is on trial; time means nothing.

Mr. Solovei: I think I am compelled to touch on it at least briefly in any event.

The Court: All right; go right ahead.

2847

By Mr. Solovei:

Q. When you were at the Hotel Bossert, if your Honor permits me to lead, then I will save time.

The Court: Yes.

Q. When you were at the Hotel Bossert, you told us here the other day when you testified in your own behalf, that they took your clothes

2848 off and stripped you and they asked you a lot of questions, is that correct? A. Yes, sir.

Q. And that later on, sometime that day of October 23, 1942, you walked around in your undershirt and trunks, in your underwear? A. That is right.

Q. Now were you that day of October 23, 1942, examined by an Assistant District Attorney? A. Yes, sir.

Q. What time was it? A. About 8 o'clock that evening, not only by the Assistant Attorney
2849 but also by the District Attorney of Kings County.

Q. Now before you were examined by the Assistant District Attorney, or by some law-enforcing agent, did you see Slip there or Spielfogel? A. They brought him in about 1:30 in the afternoon.

Q. And did you have talk with him there? A. Yes, sir.

Q. Can you tell us just about what time it was? A. I would say it was about 6:30 that evening.

2850 Q. And where was that talk that you had with Slip? A. We went into a closet, me and him.

Q. In a closet, in where? A. In the hotel. It was a 2-room suite and we went in the closet in the second room.

Q. Was that a clothes closet like? A. Yes, sir.

Q. And when you went into the clothes closet with Slip, did you have a conversation with him? A. I did.

Q. Will you tell us what Slip said to you and what you said to him? A. I looked at him and I said to him, "What are you doing this to me

for?" He said, "Well, my wife come up to me and told me you were intimate with her". I said, "She told you the same thing on the street and you almost got me that night right then and there when I denied I had nothing to do with it." He said, "Don't worry, Moish, I know you didn't do it. I know the guys that committed the crime. I won't turn you in. But I think you ought to do and say as they want you to do and say and don't let them beat you no more."

2852

Q. Well, did Slip tell you,—will you please tell us what he told you about this case. A. Then he was telling it to me and then about an hour and a half later—

Q. What did he tell you? A. He said, "Tell them that Harry Levine gave you the hat. Tell them Jake drove the car. Tell them that Joe was the tipster." I said, "What do you want me to do a thing like that for? I never knew who committed that crime." He said, "You go out and tell it to them." I walked out. He called me back in again. He said, "Moish, they are only going to hit you again." I said, 2853 "What am I going to tell it for?" He kept telling me the story over and over and as I was being examined by Detective McGowan; they were sitting at the table, Detective Captain Dowdell. Mr. Hughes was sitting there and Heffernan and the man was examining me was Detective McGowan, Captain McGowan, he was asking me questions, and Spielfogel kept telling things to me, and if I stuttered, he would tell it to me in Jewish what to say, and that is how I was answering them. They asked me, "Could

you tell the car?" I said, "I don't remember." I was trying to ask what kind of car it was. They kept asking. I said, "I don't remember what kind of car it was because he didn't even tell me about the car yet."

Q. Just a minute; when you said you did not remember what kind of a car, did you say you did not remember because you were actually in any car that committed a crime, or did you say that you did not remember because Spielfogel
2855 had not yet informed you as to what kind of a car was used? A. He did not tell me what kind of a car was used. I did not know what kind of a car it was.

Q. Did he some time that day tell you what kind of a car was used? A. Yes.

Q. When did he, Spielfogel, tell you what kind of a car was used? A. When we came to the station house Monday afternoon, he said, "They will show you a picture of the car."

Q. You mean on October 26th at the Bath Beach Station? A. Yes, sir.

2856 Q. Now on October 23rd, in the evening of October 23, 1942, you say you did say something to the District Attorney or the Police in reference to this crime, is that right? A. Whatever Spielfogel told me to say.

Q. And when you were talking to the police or to the Assistant District Attorney, how were you dressed then? A. They already had given me my clothes back.

Q. What time in the evening was it? A. I would say it was about seven o'clock. They gave me my clothes 6:30 or 7 o'clock.

Q. And how late that day were you being

questioned at the Bossert Hotel, the day of the 23rd of October? A. I was being questioned probably until 2 or 3 the next morning.

Q. When you say you mentioned the name Rudish and Indovino, did you at any time—I withdraw that. When you say you mentioned Rudish and Indovino while at the Hotel Bossert, was it something that you knew of your own personal knowledge or was it something that Slip told you as you testified to here? A. Slip told me. I never knew Indovino. I never 2858
spoke to him. I never seen the man in the street either. I never seen him until the night they brought him into the hotel.

Q. We will come to that later. Now did Slip stay over at the Hotel Bossert? A. They took him out about two o'clock that morning and took him to some County Jail. I don't know where they took him.

Q. And you remained at the Hotel Bossert? A. That is right.

Q. Did you at any time tell any detective or any officer or Lieutenant McNally that you were 2859
voluntarily staying there or that you wanted to stay there? A. I demanded to be booked that afternoon. I said, "If you know so much about it, why don't you book me then? Let me get in touch with a lawyer. Let me get in touch with somebody." He said, "No good."

Q. What was your physical condition at that time? A. I was a nervous wreck in that hotel. I was afraid any minute either I was going out of the window or they will kill me because they told me—they said, "Why do you think we didn't pick you up on your block? Why do

you think we didn't pick you up in your house? Why do you think we waited until everybody was away so we could do what we want to do with you?"

Q. Now October 24, 1942, you were still at the hotel? A. That is right.

Q. You did not leave the hotel at all? A. No, sir.

Q. Now on October 24, 1942, did they again question you? A. They kept questioning me
2861 all that day and that night.

Q. And who was it that was questioning you on the 24th of October, 1942? A. Gee, they were coming and going; a lot of detectives.

Q. And was it the same questions in substance that they asked you on the day before? A. They would ask, "Do you know what the car looks like?" I said, "I don't know; I cannot remember because I had not known what the car was." I never seen the car so how am I going to tell them what it looks like because I was in fear anything could happen to me and
2862 that is why I was saying those things.

Mr. Solovei: May I have the hat, Mr. McGough?

Mr. McGough: Yes.

By Mr. Solovei:

Q. Now on October 23, 1942, I show you People's Exhibit 14, which is a brown hat, and ask you whether or not they showed you this hat, on the 23rd? A. It looks something like it.

Q. Now you put your initials in that hat, did you not? A. In the police station.

Q. That was on October 26th? A. The 27th, in the morning.

Q. The 27th of October? A. That is right.

Q. And did you put your initials in because you were told to do it by the police? A. Spielfogel says, "What is the sense? They are only going to go to work on you again. Put them in there; that is nothing."

Q. You said to the police, did you not, that 2864
that hat you received from one Harry Levine? A. That is what Spielfogel told me to tell them.

Q. Is that where you got the name Harry Levine? A. He told me, "Harry Levine" in the hotel.

Q. Did you at any time get that hat from Harry Levine? A. Nobody never gave me any hat.

Q. Did you ever, prior to your being shown that hat in October 1942, ever see that hat? A. Never seen it in my life.

Q. Did you on February 15th, 1941, ever have 2865
that hat in your possession? A. Never seen that hat in my life.

Q. Did you at any time on February 15th, 1941, have that hat and come to Coney Island and partake in a stickup or holdup where a cop was killed? A. I never went to Coney Island until 1941 in the summer. That is the first time I went to Coney Island since I was released from Elmira Reformatory.

Q. Now on October 24, 1942, you said you were still at the Hotel Bossert? A. That is right.

Q. And you were being questioned, is that right? A. Yes.

Q. And who was questioning you on the 24th of October, 1942? A. A lot of detectives.

Q. Was the Assistant District Attorney there, Heffernan? A. He walked in and out; in and out.

Q. And was there anybody else from the District Attorney's office? A. Not that I know of.

Q. Was Slip there? A. Oh, yes.

2867 Q. Was Yellin there? A. No, I didn't see them bring Yedin in until we were in the station house.

Q. Did Slip talk to you while you were there? A. He talked to me every day.

Q. And on the 24th of October 1942, what was it that Slip said to you? A. He kept telling me more things.

Q. What? A. I don't remember what i was but he kept telling me different things about the crime; I don't know what it was.

Q. Did he tell you all about this Fox case? A. Yes.

2868 Q. He was talking to you about it? A. That is right.

Q. Prior to Slip telling you about this Fox case and prior to your meeting Slip at the Hotel Bossert on October 23, 1942, had you known anything at all about the Fox killing? A. I never knew nothing about it. I never had nothing to do with it and I still don't know about it, only what I heard in this courtroom.

Q. You knew what Slip told you? A. That is just what he told me.

Q. Now on October 25, 1942, you were still at the Hotel Bossert? A. I was.

Q. That was on a Sunday? A. That is right.

Q. And was Slip at the Hotel Bossert? A. He was.

Q. And what time did he stay there? A. Oh, he come in—he come in in the afternoon some time and then about four or five o'clock at night I think it was, they said we are going out. I asked Slip, "Where are you going?" He said, "We are going for a ride." I said, "Where are you going?" He did not tell me nothing and the next thing I knew I was down 2870
in Coney Island.

Q. Did Slip go in the car, too? A. He was sitting right alongside of me.

Q. And when you drove to Coney Island, did Slip say something to you in the car, when you got to Coney Island? A. The car pulled up near a movie's, I think it was a restaurant there, so they asked me, "Where is the Cosmo Restaurant", so Slip says to me in Jewish, "ah-doo", meaning in Jewish, "over here".

Q. And how long did you remain in Coney Island? A. Then they started riding up and down. They said, "Show us, if you know, 2871
where the bank is." I did not know where it was. Then the next thing I knew, they stopped in front of the bank.

Q. Yes. A. And they got out of the car. He said, "Does this look familiar to you?" I said, "I don't remember." Spielfogel was saying to me in Jewish, telling me, "Tell them Yes, this is the bank." So I told them, "Yes"; so they said to go point. I pointed any place; I don't know where I pointed out. I just pointed any place at all; and that is all, and

we went back in the car and started riding and went back to the Bossert.

Q. You went back to the Bossert? A. Yes, sir.

Q. That is on the 25th? A. That is right.

Q. Now on October 26, 1942, were you taken somewheres else? A. October 26th?

Q. Yes, that is on Monday. A. Well, that night they—

Q. I will withdraw that. On October 25th,
873 when you went back to the Hotel Bossert, Slip went back with you? A. Yes.

Q. Were you being again questioned at the Hotel Bossert? A. I was being questioned riding all the way back to the hotel.

Q. Who questioned you on the 25th at the Hotel Bossert? A. Heffernan, McNally, and a couple of other detectives.

Q. And how late were you that day or morning, were you being questioned? A. About 2 o'clock in the morning.

Q. Was Slip still around there? A. Yes, sir.

874 Q. Now on Monday, the 26th of October, do you remember Detective Celano taking you somewheres? A. Before he took me he said to show the car, Detective McCowan and Dowdell showed me a picture of the car, and then they took me over to a garage and I went in there and they were walking around and the next thing I knew he stopped at a car. He said, "Does that look like the car?" He showed me the picture of the car. It looked the same so I looked at it and I said, "I don't know." He said, "Open the door", so I took my handkerchief out of my pocket and I went over and

opened the door. He said, "why are you using the handkerchief?" I said, "I am being framed up, I am not going to leave my prints on the car."

Q. Did you tell him why? A. Yes.

Q. What did you tell him? A. I told him I was never in the car. I never seen the car.

Q. And that was the reason why you used the handkerchief on the knob of the car? A. Yes, sir.

Q. On the handle of the door of the car? 2876
A. That is right.

Q. And then from there you went to the Bath Beach Station? A. Back to the Station House.

Q. Is that correct? A. Yes, sir.

Q. And when you got to the station house on the 26th you were again examined at the station house, isn't that correct? A. That is right.

Q. You were in the squad room or detectives' room, is that right? A. That is right.

Q. And there was a number of detectives there, is that right? A. That is right.

Q. And then was Assistant District Attorney Heffernan there, too, at that time? A. He was. 2877

Q. And they were asking you questions and you answered a lot of questions, is that correct? A. Whatever I could have remembered, whatever he told me.

Q. Now on the 27th, you were at the Bath Beach Station House, is that right? A. That is the morning we were booked in the station.

Q. On the morning of the 27th about 2:10 a. m., you again made another statement, isn't that right? A. That is right.

Q. And was Assistant District Attorney Heffernan there? A. That is right.

2878 *Morris Malinsky—For Deft. Malinsky—Direct*

The Court: Are you going to be some time with this witness?

Mr. Solovei: I think so.

The Court: I think it might be well to take a short recess now. Gentlemen of the jury, do not discuss this case; keep your minds open.

(A short recess, after which the trial was resumed.)

2879

MORRIS MALINSKY, resumed.

Direct examination by Mr. Solovei (continued):

Q. I believe the last statement I was talking about, that you finally made, was around 2:10 a. m. on October 27, 1942? A. I did.

Q. And Malinsky, you heard, did you not, the District Attorney reading to this jury, People's Exhibit 13, the statement that you made on
2880 October 27, 1942? You have heard him read that? A. That is right.

Q. Now this statement that you made on October 27, 1942, at the 62nd Precinct, in the presence of Assistant District Attorney Heffernan, Captain John J. McGowan, Detective Charles Celano, Acting Captain James Dowdell, Lieutenant James McNally, Detective John McNally, Detective George Lowe, Lieutenant George Loures and Detective James Bell; was this a voluntary statement made by you? A. No, sir.

Q. And was this statement at the time that you made it at the 62nd Precinct at about 2:10

a. m. in the presence of these people, whose names I mentioned, was it true or was it false? A. To my knowledge, it is false.

Q. And the facts therein contained in this statement, which you made to the District Attorney, People's Exhibit 13, where did you accumulate the facts that you gave to the District Attorney when he was questioning you on the 27th day of October 1942, at about 2 a. m.? A. From Spielfogel.

Q. And this statement that you are alleged to have made on October 27, 1942, at the 62nd Precinct, which is marked in evidence as People's Exhibit 13, was it made by you while you were under the influence of fear produced by threats? A. Yes, sir. 2882

Q. And the fear and the threats that you talk about is what you related to here that happened at the Bossert Hotel from the time of your arrest up to the time that you made this statement, is that correct? A. Yes, sir.

Q. Now did you know a man by the name of Beitler? A. I heard the name.

2883

By the Court:

Q. Did you know him? A. Not to speak to.

By Mr. Solovei:

Q. Did you ever go out with Beitler? A. Never in my life did I ever go out with him.

Q. You knew Slip? Yes, sir.

Q. You knew Yellin? A. Yes, sir, I only know Yellin a short while; not long.

Q. And where was the first time in your life

you ever saw Indovino? A. Up in Elmira Reformatory.

Q. And while you were up in Elmira Reformatory and he was at Elmira Reformatory were you very friendly with him? A. I never spoke to the man in there.

Q. And where was it for the first time that you ever met the defendant Rudish? A. On 7th Street and Avenue D in the spring of 1941.

Q. Under what circumstances did you meet Rudish? A. I happened to be walking along with Spielfogel and I was walking down his house and he stopped in the candy store on 7th Street and Avenue D, and if I ain't mistaken, his mother lived at 7th Street between Avenue D and Lewis, and he was going home to his house. He lived on Lewis Street, so he stopped in the candy store for a drink and then he and I stopped in the candy store, and Rudish happened to come along and this other fellow that was sitting up here today, and I was introdueed to that other fellow Rudish by Yellin.

Q. Did you ever in all your life ever go out with the defendant Indovino? A. Never in my life.

Q. Did you ever in all your life go out with the defendant Rudish? A. I may have talked to him. I mean not go out and have fun or anything with him.

Q. Well, now, you and Slip of course were pretty friendly, is that right? A. That is right.

Q. You knew Slip's wife? A. Yes, sir.

Q. Now did you ever have any trouble with Slip at any time? A. Yes, sir.

Q. Tell this Court and jury just what trouble you had with Slip, please. A. I can recall it this here way. My mother had died on April

21, 1941, and in the Jewish religion you mourn for a week, and I happened to sit home and mourn, and my mother died on Saturday night and I mourned until the following Saturday night. I went down to the barber shop on the East Side and I was in the barber shop getting a shave and while I was shaving, Spielfogel come over to me and he said, "I want to see you when you get through." When I got through, he told me the story, he said his wife told him that I had been intimate with her; that I had rela- 2888
tions with her. I said to him, "What are you doing, kidding me?" I said, "Let us go up to your house and I will prove it." He said, "All right, some other time." So one day during the week he comes over to me, over to my store. You know, it was not over the store, but I happened to come down the East Side that day. It was on Tuesday night, and he said to me, "Let us go up to my house." While walking down to his house with him and Yellin, I got in the hall of his house, and him and Yellin pulled out a gun each, and they put it to my 2889
right side, and he said, "Come up and if my wife ever says you ever touched her I will blow your brains out." So I goes up to his house and he asked his wife. I said, "Go ahead and ask her." He did and she said to him, "No." When she said, "No", he turned around and smashed her in the eye and gave her a black eye for lying.

Q. Smashed whom in the eye? A. His wife, and after that I didn't speak to him no more.

Q. Was that the only time he threatened to

2890 assault you because of the fact that he believed that you were intimate with his wife? A. Who? Then one time his own wife, around the year of 1941, in December some time, I went to a Union meeting on the East Side, and about six fellows come over to me and said to me that—first they said to me I should help him get an appeal. I said, "Why should I get an appeal? I didn't have anything to do with his crime. What am I, his father?

2891 By the Court:

Q. Who said that? A. His wife sent about six fellows down to me.

By Mr. Solovei:

Q. His wife sent them down? A. Yes.

Q. For you to help Slip get an appeal? A. Yes, sir.

2892 Mr. McGough: Can you fix the date?

Q. Can you fix the date of that? A. That is around December of 1941. I went to a Union meeting. I think it was in Beethoven Hall.

Q. He had already been sentenced from 30 to 60 years? A. Yes, sir.

Q. For his conviction in New York County? A. Yes, sir.

Q. Proceed. A. So I said, "Where am I going to get the money?" I says, "I would like to help the fellow if I could help him. After all, he is doing a lot of time. I cannot help the guy. I got my ownself to support," and they

were threatening to kill me, too. They wanted to take me to that house and I knew I would have got killed on the street out of that meeting hall.

Q. Did you, while Slip was in the Jail, did you make some contributions to his family? A. Well, his wife approached me a few times and started crying; she has nothing to feed the kid; she has nothing to dress the child. And I says, "Look, what am I, his father? I feel sorry for the kid. If I get an extra few dollars, I will give it to 2894 you."

Q. And did you from time to time make contributions to Mrs. Spielfogel? A. I did.

Q. And was there a time when you stopped the contributions? A. I did.

Q. And did she come to your house, and at some time thereafter when you stopped the contributions? A. She came quite a few times.

Q. Did you talk to her? A. I talked to her about six weeks previous before I got arrested.

Q. What did she say? A. She said to me, "Slip says if you don't send him money in jail, 2895 every week, he is going to frame you into something, and if he don't frame you, he is going to make a break from Sing Sing and you are the first guy he is going to kill."

Q. Now on February 15, 1941, did you aid and abet Abraham Beitler, together with the defendants Sidney Rudish and Joseph Indovino, in the killing of one Leon Fox with a pistol at Coney Island, in the Borough of Brooklyn, County of Kings, City and State of New York? A. I did not.

Q. Well, did you at any time tell Slip that

2896 you were going on a job, to stick up a payroll or a theater manager in Coney Island at Loew's Theater in the Borough of Brooklyn? A. I did not.

Q. And did you at any time ask Slip or anybody to come along with you on that job? A. I never asked anybody. I never heard of it.

Q. Did you at any time talk to Yellin or talk to a man by the name of Sam Kovner telling him that you were going on this job at Coney
2897 Island where a bank manager was to be held up and stuck up? A. I did not.

Q. A theater manager, rather? A. I did not.

Q. And did you on February 15, 1941, at about 1 or 1:30 a. m. in the morning go to Slip's house in New York and tell him about some cop being killed in Coney Island? A. I did not.

Q. Were you at Slip's house at 1 or 1:30, the evening of February 15th and the morning of February 16th, and make any such statement? A. I was not and never made such statement.

Q. Did Slip say to you at any time, "Where
2898 is your hat?", and did you at any time say to Slip, "I lost my hat on the hoist", and did he give you a green hat in return? A. He never gave me a hat in his life.

Q. Did you at any time that morning go with him, as he has testified, from his home at about 1:30 a.m. in the morning and walk over to Rouch's place of business where you worked and there bury the pieces or hide the pieces, which he said, pieces meaning guns? A. I never had no guns and I never hid no guns.

Q. Did you at any time that morning of the 16th, as Slip testified to here, go to Rouch's

place of business and there place a bunch of silver which he says that you told him that you got from the stickup at Coney Island? A. I did not.

Q. Did you at any time tell Slip or any living human being in the world that you ever received a total of about $150 from a stickup at Coney Island, more particularly on February 15, 1941? A. I never told anybody such thing.

Q. Did you at any time in your life receive from Beitler or any living person $150 in bills and some in silver as your share or your proceeds by reason of a stickup in Coney Island on February 15, 1941? A. I never did. 2900

Q. Did you at any time in your life ever have a conversation with Beitler in reference to any payroll holdup in Coney Island? A. No, sir.

Q. Did you ever have a talk with Beitler on Houston Street? A. No, sir.

Q. Or near Attorney Street? A. No, sir.

Q. About three days prior to February 15, 1941? A. No, sir.

Q. Did you at any time tell Beitler or any living person that you could get a car for the stickup which is supposed to have taken place on Saturday night, February 15, 1941? A. No, sir. 2901

By the Court:

Q. You never spoke to Beitler in your life? A. I never spoke to him. The only place I ever seen him was in Elmira. I never talked to the guy. He was a bigshot. I was a crumb; that is the way I was considered.

2902 By Mr. Solovei:

Q. Did you at any time say to anybody that you could get some guns for a stickup, more particularly the alleged stickup that took place on February 15, 1941? A. I never told nothing like that to anybody.

Q. Now you saw a man here in uniform testify. His name was Red Tiplet, they called him. His name is Eisler. Did you see him here? Yes, sir.

2903 Q. Now did you some time in December or in the winter of 1940, ever give him a little tag with a number on it, and tell him to go to some stand in the neighborhood of 42nd Street and there get a package for you? A. No, sir.

Q. Did he at any time—

The Court: Nothing of the kind ever happened?

The Witness: No, sir.

By Mr. Solovei:

2904

Q. Did he at any time ever bring a package to you at the Citadel Club and then did you open that package, and did that package contain any guns or revolvers? A. I never seen no package.

Q. Did you ever show this Red Tiplet any guns or revolvers that you got from anybody? A. Never had no gun in my life.

Q. Did you at any time in your life ever have a package under your arm, wrapped in newspaper or in wrapping paper or any way at all, while you were with Spielfogel and met Spiel-

fogel at any time in New York County? A. No, sir.

Q. Did you ever go with Spielfogel to the 10th Street and First Avenue and hide some pieces, which Spielfogel referred to here as guns? A. No, sir.

Q. Did you ever tell Spielfogel that the "donkey" went down like a ton of bricks? A. I never said such a thing to him in my life.

Q. Did you ever tell Spielfogel or anyone living that the money was in a canvas bag which 2906
was torn open with a knife and the money was removed by Beitler? A. No, sir.

Q. Were you at any time in a taxicab with this man Beitler, going from Coney Island to New York, and then exchanging for another cab and finally arriving in New York? A. No, sir.

Q. Did you ever show Slip any guns while you were working at the 10th Street store, Rouch's? A. No, sir.

Q. And on the morning of the 16th of 1941, did Slip walk you to Essex and Delancey Street, 2907
and did you finally go home at 4 a. m. in the morning? A. He did not walk with me.

Q. Were you there at 4 a. m. in the morning A. I don't remember being there.

Q. Were you with him at all that time? A. I don't remember being with him even.

Q. You did see him in New York often, didn't you? A. Sure.

Q. You did see Rudish and Indovino at the Bossert Hotel, didn't you? A. Yes, sir.

Q. Did you ever tell Slip or anybody, "I might as well get it over with," and you asked

for somebody by the name of Nat Math or a rabbi? A. I didn't say nothing of the kind.

Q. Now you have a sister by the name of Shirley, and she is married to somebody by the name of DiPisa, is that right? A. That is right.

Q. And at that time on February 15, 1941, Shirley and DiPisa lived, can you give us the street? Was it on 10th Street? A. On East 10th Street.

2909 Q. Between First and Second Avenues? A. That is right.

Q. Now on the morning of February 16th, about 2:30 a. m., did you go to your sister Shirley's house at 10th Street, between First and Second Avenues? A. No, sir.

Q. And did you there knock at the door? A. No, sir.

Q. At about 2 or 2:30 a. m.? A. No, sir.

Q. And were you admitted into a room, or the kitchen of the apartment, and did you say to Shirley, your sister, and her husband DiPisa, in the presence of one Jean, known as Virginia 2910 now Goonan, that you just shot a cop and that you want to stay there that night? A. I did not.

Q. Or words to that effect? A. Never said nothing like that.

By the Court:

Q. You were not there? A. The last time—

Q. No, no; you were not there on February 16th, in the early hours of the morning? A. No, sir.

The Court: Proceed.

Mr. Solovei: That is what I was just going to ask.

The Court: Proceed.

By Mr. Solovei:

Q. You did know this girl Jean who gave her name as Virginia Goonan? A. I do.

Q. You did go out with her? A. Maybe once or twice.

2912

Q. At times? A. Yes.

Q. Now will you tell us when it was, if you can tell, the last time that you met Virginia Goonan, and under what circumstances? A. Well, the last time I seen her was around in October or November of 1940. She come over to me and said to me she is in the family way—

Mr. McGough: I object to what she said.

By the Court:

2913

Q. The last time you say you saw her was in October? A. October or November, 1940.

Q. Of 1940? A. Yes.

By Mr. Solovei:

Q. And what happened?

Mr. McGough: I object to it.

The Court: Objection overruled.

By Mr. Solovei:

Q. What happened? A. She said to me, "I am

2914 in the family way," so I said, "What has that got to do with me?" So she says to me, "I think you are the guy". I says, "I ain't the guy. I never had nothing to do with you." I said, "Don't come near me any more." That is the last I ever seen her and the reason she slept in my sister's house—

Mr. McGough: That is objected to.
The Court: Objection sustained.

2915 By Mr. Solovei:

Q. Did she ever say to you at any time that you saw her, more particularly on the morning of February 16, 1942, "If you shot a cop, I don't want to have anything to do with you"? A. I never seen her that time.

Q. Did you ever give this man, Red Tiplet, known as Eisler, $4 to get a package for you at 42nd Street? A. Never gave him a nickel.

Q. Now can you tell us under what circumstances this girl Shirley did ever come to your
2916 sister's house? A. What did you say?

Q. I mean, Jean or Virginia.

The Court: Is that hearsay?
Mr. Solovei: What?
The Court: If it is hearsay, I will not permit it. There has been plenty of hearsay in this trial.
Mr. McGough: I have not objected for a good reason.
The Court: You are not doing anybody any favors. We are not trying cases on hearsay here. That is not a matter of

charity to one side or the other. We are going to try cases on legal evidence, not on hearsay; not what this man heard and what that fellow heard. That is not the way to try cases. Go ahead.

By Mr. Solovei:

Q. Did you ever have any trouble with Di Pisa? A. I did.

Q. Will you tell this Court and jury what trouble you had with Di Pisa and when? 2918

Mr. McGough: That is objected to.

The Court: Objection overruled.

The Witness: Around October or November 1940. I come up to my sister's house, and I seen her crying. I asked her what was the matter. She would not tell me. I seen she was crying; she was all black and blue. I said, "What is the matter?" She would not tell me, and then all of a sudden she come out and told me. 2919

Mr. McGough: Objection.

The Witness: He just beat her.

The Court: Objection overruled.

The Witness: He just beat her. I lost my head and I hit him a couple of times and I walked out of the house and I said to my sister, "If you want to leave him now, you can leave him any time you want and I will support you before living with the likes of him." That is the last I ever saw of him.

By Mr. Solovei:

Q. Of course, you are Jewish? A. Yes, sir.

Q. And Di Pisa is Italian? A. Yes, sir.

Q. Now let me ask you; did you at any time in your life, and more particularly on February 15, 1941, directly or indirectly, aid and abet, assist, counsel and advise one Abraham Beitler in the commission of a crime at Coney Island, wherein a police officer, Leon Fox, was killed? Did you? A. I did not.

Q. Did you in any way by the widest stretch of imagination have anything at all to do with that case, the Fox killing in Coney Island? A. I never knew nothing about it and still don't know nothing; only what I heard.

Q. Do you remember when you were taken from the Bossert Hotel to Coney Island? A. Yes, sir.

Q. Can you tell this Court and jury just how you went there and by what route? A. I went up Hicks Street through that new highway, going along the Narrows, what is it, Third Avenue? That starts at the foot of Hicks Street and Hamilton Avenue, goes up along the Narrows and all along Fort Hamilton and out to Coney Island that way.

Q. In any event, that is the route you took in an automobile belonging to the detectives, is that right? A. Yes.

Q. Did you see any water or boats or anything at all through your travel there? A. One of the detectives passed a remark to me there was a boat docked with the hull shot away, like it was torpedoed. He said, "Look at that boat the way it is shot away."

Q. Did you at any time direct the chauffeur driving the car how to get there? A. I never directed him.

Mr. Solovei: I think that is all.

Cross-examination by Mr. McGough:

Q. Malinsky, do you recall Mr. Heffernan asking you at the close of the statement, "How did the police treat you?" Do you remember that question being asked of you? A. Yes, sir. 2924

Q. Do you remember the answer you made? A. I had no other alternative but to make that answer.

Q. But whether you had no alternative or not, what was your answer? A. I don't remember what was said.

Q. Would you like me to read it to you? A. Read it. I don't know.

Q. "Q. You are making this statement volantarily to me? A. Yes, sir." Do you remember that question and that answer? A. Maybe; I don't remember. 2925

Q. You don't remember that? A. No, sir.

Q. Was Spielfogel sitting in back of you when you made that answer? A. No, sir.

Q. Where was Spielfogel at the time you were giving this statement? A. He was in the next room.

Q. And do you remember this question, the one right after: "Q. Anybody forced you or did anything to you, did they?" Do you remember that question? A. I only had one alternative, to answer.

Q. You answer me; do you remember that question? A. I may have said it.

Q. Do you remember your answer? A. I don't remember.

Q. Your answer was "No", is that right? A. I don't remember.

Q. Do you remember the next question: "Q. How have the police treated you since you have been with them?" Do you remember that question? A. Yes, sir.

927 Q. What did you say? A. I only had one alternative, to say "Yes".

Q. Is that what you said, "I only had one alternative"? A. That is the only alternative I had.

Q. Did you say in answer to that question to Mr. Heffernan: "A. All right." Do you remember that? A. I may have said that.

Q. Do you remember the next question and the next answer: Did you make this response to this question: "Q. Nobody did anything wrong to you, did they? A. No." Do you remember that question and that answer? A. I don't remember.

Q. Do you remember getting a big steak right after the questioning was finished? A. No, sir, I never got no steak.

Q. Do you remember saying, "I feel much better now"? A. No, sir.

Q. Did you get any steak after the questioning? A. No, sir.

Q. Did you get anything to eat at all? A. I could not eat nothing. The only thing I ate was a litle orange juice or a glass of coffee.

Q. Do you remember telling the detectives you would like to have a shot of whiskey—

The Court: Don't ask him if he remembers. Ask him if he said that.

Q. Did you ask the detective whether you could have a couple of drinks of whiskey? A. No.

Q. Did you get any whiskey after the questioning was finished? A. No, sir.

Q. Will you take this hat, Malinsky. Try it on your head. Put it on the regular way, front and back. 2930

The Court: Straighten out the lining inside.

Mr. McGough: I think it is straight, Judge.

The Court: Proceed.

By Mr. McGough:

Q. Pretty good fit, isn't it?

Mr. Solovei: I object to it.

The Witness: No, sir: that hat don't fit on my head. 2931

By Mr. McGough:

Q. Pull it down a little bit more; all the way down. A. That hat don't fit me. Never fitted me.

Q. Put it back on your head, please. You are not afraid to handle the hat, are you? A. What did you say?

Q. Are you afraid to handle that hat, People's Exhibit 13?

Mr. Solovei: I object to the question.

Mr. McGough: I want the record to show he threw it away and it fell down in front of him.

The Court: He did throw it down. The record may show he threw it down over the bench and on the floor.

By Mr. McGough:

Q. Hold it by the front and back. Will you take it off, please. Put it right in front. A. (Witness puts hat on head.)

The Court: Put that hat on again.

(The witness puts the hat on his head.)

The Court: Pull it down over your forehead a little more. Over your forehead, not on the back of your head. Put the brim down. Straighten it out. Straighten the brim out, the brim in front. Straighten out the creases. All right now, face the jury.

(The witness faces the jury with the hat on his head.)

The Court: All right.

Mr. McGough: May I have that back?

(The witness returns the hat to Mr. McGough.)

By Mr. McGough:

Q. Did I understand you to say that you never had any guns; no time? A. No, sir.

Q. Did you mean no time in 1941 or no time in your life? A. Never had a gun in my life.

Q. Did you have a gun in your hand on the job that you were convicted of and sent to Elmira on? A. No, sir.

Q. That was a robbery, was it not? A. Attempted robbery.

Q. Didn't you have a gun in your hand then? A. No, sir.

Q. On your person? A. No, sir.

Q. Did some of your associates in the case have a gun? A. They may have.

Q. How many men were on that case with you? A. There was two of us arrested. 2936

Q. Frank Damino and John Crawford? A. I Don't remember his name.

Q. Do you know a man by the name of Samuel Caminetti? A. I don't remember his name.

Q. You told us you had some trouble with Slip's wife sometime around April 21, 1941? A. Yes, sir.

Q. Was it after that trouble as you said that Slip's wife sent some persons over to get money for an appeal? A. No, that is after he was up in Sing Sing already.

Q. The trouble with his wife was after she sent someone to speak to you, about getting appeal money for Slip? 2937

Mr. Solovei: I object to the question. He is assuming a state of facts not in evidence.

The Court: May I hear the question, please, Mr. Stenographer?

(The question was repeated to the Court.)

The Witness: With Slip, I had the trouble on account of his wife.

By Mr. McGough:

Q. What I would like to know is, when was it that Slip's wife wanted you to help with Slip's appeal? Was it before the time that Slip had the trouble with you or was it after? A. It was 'way December some time in 1941.

Q. Then if it was in December 1941, it was after the time that you say Slip's wife got the black eye? A. That is right.

2939 Q. In other words, sometime in April 1941, you and Slip had an argument about his wife? A. Yes.

Q. And later on, about eight months later, they came to you and asked you to help with Slip's appeal? A. Yes, that is right.

Q. And you say that while he was in State's Prison, you did on various occasions send some money to his family? A. His wife.

Q. Is that right? A. That is right.

Q. How much did you send? A. $3; $5.

Q. You sent that every week, didn't you? A. No, sir.

2940 Q. You sent $10 some weeks? A. What did you say?

Q. You sent $10 some weeks? A. No, sir.

Q. $15 one week? A. No, sir.

Q. How did you come to send money? Was it Money Order or was it cash, or by messenger? Tell us, please, how you sent it? A. I sent her a Money Order.

Q. Sent a Money Order direct to her? A. Yes, sir.

Q. Mailed it? A. Yes, sir.

Q. When you applied for the Money Order,

you gave your name? A. I don't remember if it was my name I gave.

Q. I beg pardon? A. I don't know if it was my name.

Q. You mean, you might have used a false name? A. Yes.

Q. In other words, you did not use the name Malinsky? A. That is right.

Q. Was there any reason why you did not send the Money Orders under your true name? A. No reason at all; no reason.

2942

Q. Do you recall what name you used? A. No, sir.

Q. You told this Court and jury a short while ago, did you not, that you never received a hat from anybody? A. No, sir.

Q. Is that right? A. That is right.

Q. Do you remember the little boy Peter Shamin that testified here? A. Yes, sir.

Q. Didn't you tell him that you received a gift hat from somebody? A. Never told him nothing like that in my life.

Q. You are sure about that? A. Yes, sir.

2943

Q. Did you on the 15th day of February 1941, tell that boy to go into the hall, between the two napkin boxes, and get out a bag of pieces and put them in the toilet? A. Never told him anything like that in my life.

Q. You are sure about that? A. Yes, sir.

Q. Isn't it a fact that in the morning of that particular day, on that Saturday morning, you and Slip and a third man known as Johnny the Pollak— A. Who?

Q. —took those guns down on Fulton Street in New York to stick up a paymaster? A. No, sir.

Q. Can you tell us where you spent the morning, of Saturday, February 15th? A. Right where I worked.

Q. Were you in the store all day long? A. Yes, sir.

Q. Did not leave at all? A. No, only for lunch.

Q. Outside of lunch, you did not leave? A. No, sir.

Q. Sure about that? A. Yes, sir.

2945 Q. Did you hear the parole officer say you made a visit at 5:52 that day? A. He must be mistaken because I reported on Wednesday. I never reported on Saturday in my life. There must have been a mistake. It must have been a typographical error. Somebody must have made a mistake.

By the Court:

Q. You are talking about the parole officer and his records? A. Yes, sir, I always reported on Wednesday. I never remember reporting on
2946 a Saturday.

By Mr. McGough:

Q. You worked there on that Saturday from the time they opened until the time they closed? A. Yes.

Q. Is that your story? A. Yes, sir.

Q. And Mr. Rouch was the boss? A. Yes, sir.

Q. He saw you there? A. He must have seen me there; he is my boss.

Q. Where is Mr. Rouch today? A. I don't know.

Q. Is he still in business, if you know? A. I don't know.

Q. Well, now, isn't it a fact that between the time that you were at the Bossert and the time you went to the Bath Beach Station, that you went down to Coney Island and showed the police just how the crime was committed? A. I did not.

Q. Didn't you go down to West 12th Street and Surf Avenue with all the detectives? 2948 A. They took me there.

Q. Didn't they take you down there? A. They took me there themselves.

Q. And didn't they ask you, "Tell us, Moish, where the car was; point it out"? A. No, sir. They asked me but I could not show it to them.

Q. How long were you down at that particular corner? A. About ten minutes; five minutes, not long.

Q. They just asked you where the car was and took you away; is that what you mean? A. That is all, and then they went back to the 2949 Bossert.

Q. Did you see McNally there? A. Yes, sir.

Q. Did you see McNally go over and touch a hole in the concrete? A. No, sir, he did not touch no hole at all in the concrete. I did not see him touch no holes.

Q. Was Spielfogel there at the time it was re-enacted? A. Yes, sir.

Q. Was he talking in Jewish to you? A. Yes, sir. What did you say? I didn't get that question.

Q. I withdraw that. At the time the detec-

tives took you down to the bank, you knew, did you not, they were at the scene where Fox was killed? A. I did not know it until Spielfogel told me in Jewish, "ah-doo-uh", meaning "here".

Q. Where was it he told you that in Jewish? A. At the bank.

Q. In Coney Island? A. Yes, sir.

Q. Is that the only thing he said to you in Jewish? A. That is all. He may have said more; I don't recall.

2951

Q. Did you see the manager there at that time? A. No, sir.

Q. Did you tell the police at that time that you were waiting there a long time, half an hour, 45 minutes or an hour? A. Never told them anything like that.

Q. Never told them that? A. No, sir.

Q. Sure about that? A. Yes, sir.

Q. Well, Spielfogel never told you to say that, did he? A. He did so.

Q. After you did say it? A. What? I didn't get you.

2952 Q. Did Spielfogel tell you how long you were there? A. They never asked me a question like that.

Q. Listen to this question. I am reading from Exhibit 13: "Q. Well, now how long would you say it was, 10, 15 or 25 minutes? A. Maybe half an hour, three-quarters of an hour; something like that." Do you remember that? A. I don't remember.

By the Court:

Q. Speaking of the time when the statement

speaks of your waiting at the scene for the policeman and the manager of the theater to come along, Mr. McGough is referring to this alleged statement that you waited there for a certain length of time. Did you say that? A. I don't know. Maybe, I don't remember saying that.

Q. Did you ever have any trouble with Tiplet? A. I never hardly bothered with the man.

Q. What I want to know is just a simple thing. Take your time. I want to know if you ever had any trouble or any argument or any 2954
feeling with Tiplet; the man, Red Tiplet. A. Maybe I only spoke to the man once or twice.

Q. You never had any trouble with him? A. Never even know the man.

Q. Never had any dispute or argument with him? A. I don't remember.

Q. You are not on bad terms in any way? A. I never had anything to do with him.

Q. In other words, he is not sore at you as far as you know, and you are not sore at him, using the language that is commonly used? A. I never had much to do with him.

Q. How about this other man, Shamin? Did 295
you ever have any fight with him? A. The only way—

Q. Did you? A. Not that I know of.

The Court: All right, proceed. Excuse the interruption.

Mr. McGough: It is all right.

The Court: Proceed.

By Mr. McGough:

Q. Did you ever take a gun down into the

2956 cellar of Rouch's and click it at Peter Shamin? A. Never, I never had a gun in Rouch's store. I never saw the person.

Q. Isn't it a fact that right down in the staircase you had several guns bunked in the ceiling? A. Never.

Q. Did you ever take a gun out of that recess and point it at Shamin and click it and say it is not loaded? A. No, sir.

Q. Getting back to the statement, do you re-
2957 member this question; talking about the car: "Q. And how far down the block was that car parked?" Do you remember that question being asked of you? A. It may have been asked.

Q. Did you make this answer: "A. Where we were parked yesterday. I don't know how many feet." A. I may have said it. I don't know.

Q. Did Spielfogel tell you to say that? A. He was telling me a lot of things when we got back to the hotel.

Q. Did he tell you to say, "Where we were parked yesterday"? A. He may have told me
2958 that.

Q. Do you remember whether he did or did not? A. I don't remember.

Q. Do you remember the preceding question and answer: "Q. Now when you went around to that street, will you please tell me in what direction your car was parked? A. It was parked facing where we rode up across the street, what is that, Surf Avenue." Did you make that answer? A. Spielfogel told me.

Q. Where was he when he told you that? A. In the car was that there. In Jewish; he was

sitting alongside of me when he was talking to me.

Q. You mean riding to Coney Island? A. Down there in Coney Island and going back to the hotel, too.

Q. I think you told us that you were never there until some time later in Coney Island, in '41. A. The first time I went to Coney Island and when I come out of Elmira was 1941, in the summer.

Q. Do you remember this question and this answer: "Q. Facing towards the water or away from the water? A. Away from the water." Did you make that answer to that question? A. I may have, I don't remember. 2960

Q. Did Spielfogel tell you to make that? A. Almost everything that I—99 per cent of what I said there is what he told me; 100 per cent.

Q. You tell me, at the time you were making the statement he was in another room, is that right? A. He was with me for four days telling me everything; everything he was going over with me every day.

Q. And you of course said, "Yes, yes, that is fine," is that right? A. Whatever he told me, that is what I was saying. 2961

Q. You told this Court and jury that when you went up to the door handle of the car, you covered it with a handkerchief? A. I had a handkerchief.

Q. But still you were telling the police and the District Attorney that you were participating in this crime? A. What did you say?

Q. Is that what you want us to believe? A. I don't get you.

2962 By the Court:

Q. What Mr. McGough means is this. Try to use plain English to the witness. A. I can understand some of it.

Q. Let me see if we can ask you the question in plain English. What Mr. McGough asked, if I understand correctly, is this; you testified that when you went to the garage, you took out a handkerchief and you put it on the handle of
2963 the door and you said to the Copper, "I know all about this business and I am not going to let you frame me by putting my bare hand on the handle. I am going to use a handkerchief", or something to that effect? A. Yes.

Q. Is that right? A. Yes.

Q. Now what he asks you is this, if I understand his question correctly; you would not let a cop frame you by putting your fingers on the handle and you used a handkerchief? A. Yes.

Q. He asks you whether or not you made a confession, placing yourself right into the middle of this killing. That is what he is asking, if
2964 I understand.

Mr. Solovei: I object to the form of the question.

The Court: I will sustain it as to form. I am trying to make this witness understand what the District Attorney is asking. Do you object to it?

Mr. Solovei: I object to the question in that form; yes, sir.

The Court: Objection sustained.

By Mr. McGough:

Q. You told us that when Mr. Heffernan was there, Captain John McGowan, the head of the Homicide Squad was there, too, is that right? A. When was that?

Q. The time the statement was taken at the 62nd Precinct? A. That is right.

Q. Did you tell Captain McGowan that you were beaten? A. No, sir.

Q. And you were afraid not to make a statement? A. No, sir. 2966

Q. Did you tell Mr. Heffernan anything about being beaten? A. Well, I had one alternative, just to do and say what I was told to do and say, or else. That is the way I went along.

Q. Did you tell Mr. Heffernan anything about being forced— A. No, sir.

Q. —to confess? A. I did not.

Q. Did you tell either one of those men or any of the other policemen that Spielfogel gave you all this information? A. Probably a few of them must have known it.

Q. I asked you and I ask you again; did you tell any of those men, Mr. Heffernan or Captain McGowan— 2967

The Court (addressing Mr. Morritt): Counselor, please take your seat. You are interrupting the proceedings. Just please sit down and do not be bobbing up every moment.

By Mr. McGough:

Q. Did you make known to anybody, before

2968 you came to court, that this information was given to you by Spielfogel? A. Before I came here to court?

Mr. McGough: Read the question to him.

(The question was repeated by the stenographer.)

The Witness: Before I came here today in court?

2969 Q. Did you ever tell any officials about Spielfogel giving you this information? A. No, sir.

Q. Spielfogel never told you he was down there when Fox was killed, did he? A. He didn't tell me nothing like that.

Q. I cannot hear you. A. I don't remember. He told me he knows I did not do it. He knows who done it. He heard who done it.

Q. And of course you were in your right mind when you were making these answers? A. Yes.

Q. You were not intoxicated or anything? A.
2970 I was not intoxicated but I was in a mental—my mind was under a mental strain.

Q. You were a little upset because they charged you with the shooting of the policeman, is that what you mean? A. I was more afraid of my life than what they are charging me with. I know they were charging me with a crime I never committed. I was more afraid of what they were going to do to me.

Q. Did you tell Mr. Heffernan that you were innocent, when you were making the statement? A. When he come to the hotel at first I told it to him.

Q. You told it to Mr. Heffernan? A. When he first came to the hotel.

Q. What did you tell him? A. He was questioning me and I told him I didn't know nothing about the crime and I never knew nothing about it.

Q. That was on Friday? A. Yes, sir.

Q. And when you saw him again early Tuesday morning, you again told him you were down in Coney Island and you gave him the statement? A. Yes, sir.

2972

Q. On Tuesday morning before the statement was taken, you did not tell Mr. Heffernan that you were innocent, did you? A. I told you I had one alternative only.

Q. What do you mean by just one alternative? A. After getting beat again, so do and say what I was told to do and say.

Q. Somebody told you that? A. Yes.

Q. Who told you that? A. They did not stop from hitting me because they wanted to.

Q. And you were only struck on Friday? A. And I said, "I will do what you want and say; stop hitting me."

2973

Q. So on Friday you had a talk with Spielfogel? A. Yes.

Q. Right after that talk, you told the policemen everything? A. I did not tell it to the policemen. I told it to Mr. Heffernan and Mr Hughes when they came in, whatever he told me that day.

Q. That was on Friday? A. What he told me that day, Friday.

Q. Now who was it that said, "There is only one alternative?" A. I said—they said, "Why

do you think we did not pick you up at your house?"

Q. Answer me, please. A. A couple of detectives said it.

Q. Give us their names. A. I don't remember the names.

Q. Although you made a statement on Friday night about 5:30, you said they were talking to you about only one alternative? A. It was not 5:30.

2975 Q. What time was it? A. About eight o'clock that night.

Q. Anyway, you had told the story then that you were down on this job, is that right? A. That is right. That is after—I was told what to say.

Q. The next day, did anybody say to you, "You have got one alternative"? A. I used my own imagination for that.

Q. Did anybody tell you; that is what I want to know? A. Not that I remember.

Q. How about the day following? A. I don't remember.

2976 Q. How about Sunday? A. I don't remember.

Q. You are sure you cannot remember that? A. No.

Q. Well, now, how about all day Monday? Did anybody tell you that the District Attorney is coming down and you had better make it a good statement? A. I don't remember.

Q. How about early Tuesday morning, just before this was given, did anybody tell you, "You had better tell Mr. Heffernan the whole story or there is one alternative"? A. They may have told it to me; I don't know.

2977

Q. Was it told to you, and if so by whom? A. I cannot remember.

Q. Did you have anything to eat between the hours of Thursday or Friday and the time you made the statement? A. I could not eat a thing.

Q. Did you have anything to eat at all? A. No, sir.

Q. Did you eat after that? A. The first time I ate is when I went to the County Jail.

Q. Didn't you have anything to eat down at the 62nd Precinct? A. Not a thing. I could not eat nothing for three weeks after that.

2978

By the Court:

Q. Did you ever have any trouble with Sam Kovner? A. I don't even know the man.

Q. The man that testified? A. No. I never spoke to the man in my life.

Q. Did you have any trouble with him? A. I don't know the man.

The Court: Proceed.

2979

By Mr. McGough:

Q. Now you were working at that time, in February 1941? A. That is right.

Q. How much a week were you getting at Rouch's? A. At that time?

Q. Yes. A. $15 a week.

Q. $15? A. That is right.

Q. You were giving a little money at home, I assume? A. $5 a week.

Q. Did you ever buy any haberdashery over at Toby Dunn's? A. Yes.

Q. You bought haberdashery? A. In the summer of 1941.

Q. Right after the Fox case, didn't you buy about $50 worth of shirts in that place? A. I did not.

Q. You are sure about that? A. Yes, sir.

Q. Did you buy some clothes at Joe & Paul's, on Stanton Street and Essex, right after the
2981 Fox job? A. No, sir.

Q. Did you ever buy a light blue topcoat at Joe & Paul's at any time in your life? A. Yes, sir.

Q. When? A. Around April.

Q. Of 1941? A. Yes, sir.

Q. How much did it cost? A. $24.75.

Q. Did you buy anything else there at that time? A. Not that I remember; not that I remember.

Q. Did you ever buy any hats there? A. Not in Joe & Paul.

2982 Q. What is the largest purchase you ever made at Toby Dunn's Haberdashery? A. I don't remember. I may have bought a shirt or two.

Q. Can you tell us the largest amount? A. No, sir.

Q. That was when he had a store two steps down? A. Yes, sir.

Q. That was on Clinton, between Grand and Broome? A. That is right.

Q. Right opposite the station house? A. The station house I think is right off the Bridge.

Q. The station house is a block away? A. I think it is right off the Bridge.

Q. Are you certain that you never bought $40 or $50 worth of haberdashery at Toby Dunn's sometime in the latter part of 1941? A. That is right.

Q. Did Spielfogel tell you to say that the right rear door of this car was hard to open? A. He may have told it to me; I don't remember.

Q. Do you recall whether or not he did? A. 2984
I cannot recall it. He may have and he may not; I ain't sure.

Q. Did you ever tell anybody at any time that Yellin and Spielfogel put guns to your head? A. A lot of people knew about it. I didn't have to tell that to them.

Q. Did you ever tell that to McNally or Heffernan or anybody else? A. No, sir.

Mr. McGoughl: That is all.

By the Court: 2985

Q. Tell me, Malinsky, were you afraid of Celano? A. Was I afraid of him?

Q. When he told you to put your hand on the car? A. I was afraid. I was waiting any minute anything to happen.

Q. Take your time, Malinsky, to understand the question. Relax. When Celano had you in the garage and told you to open that door and try that door, were you afraid of Celano? A. Yes, sir, I was afraid of them from the minute—

2986 *Morris Malinsky—For Deft. Malinsky—Redirect*

Q. Let me understand what you said. You said to him, "I am not going to be framed up;" is that right? A. Yes.

Q. And you took out your handkerchief and opened it with your handkerchief? A. Yes, sir.

Q. Did Celano tell you to open it with your bare hand? A. Yes, after he told me.

Q. He told you to open it with your bare hand but you did not? A. After, I did.

Q. After, you did? A. Yes.

2987

The Court: Proceed.

Redirect examination by Mr. Solovei:

Q In this statement, called People's Exhibit 13, the District Attorney read you some questions, wherein it is stated that you voluntarily make this statement and that you were not forced by anybody and that you were treated all right by the police; and nobody did anything wrong to you? Do you remember him reading you those questions and the answers that you made? Do you remember that? A. Yes, sir.

2988

Q. Now in making the answers to those questions, will you please tell the Court and jury just why you did it? A. Because I was in fear of my life.

Q. And did you also have in mind your twenty-five skin graftings that you had on your stomach?

Mr. McGough: I object to it.

By Mr. Solovei:

Q. When you claim that you were assaulted by the police, as you testified to, under your voir dire examination?

The Court: It is leading, but I will overrule the objection.

Mr. McGough: The last time I heard of it, it was 21. Now it is going up.

The Court: Objection overruled. 2990

Mr. Solovei: That is unfair of the District Attorney. If I—

The Court: I have overruled his objection.

Mr. Solovei: I am talking about his statement. I might have made a mistake.

The Court: You are perfectly within your rights in asking the question. Please proceed.

By Mr. Solovei:

2991

Q. Did you also have that in mind? A. Yes, sir.

Q. Now these statements, that you are alleged to have made, and the answers that you gave to these questions, as appears in People's Exhibit 13, when made by you at that time on the 27th day of October 1942, were they true or false?

Mr. McGough: That is objected to.

The Witness: To my knowledge they are false.

2992

The Court: He has already testified to that several times, but you may ask him again.

By Mr. Solovei:

Q. Are they just as false today as the day you made them, October 27, 1942? A. That is right.

2993

Mr. Solovei: That is all.
The Court: All right, step down.
Mr. Solovei: Just one moment, please.
The Court: All right.

By Mr. Solovei:

Q. I show you this Defendants' Exhibit C for identification, which is your hat. Please try that hat on. That is your hat? A. Yes, sir.

Mr. Solovei: I offer the hat in evidence.

2994

Mr. McGough: I object to it.
The Court: Objection overruled; mark it.

(Hat received and marked Defendants' Exhibit 3.)

Mr. Solovei: Will the record show that this is the defendant Malinsky's exhibit, because of the other two defendants?
The Court: Yes.

 2995

By Mr. Solovei:

Q. Now I show you People's Exhibit 14 in evidence and ask you to put this hat naturally, without forcing it, on your head.

Mr. McGough: I object to it. He has already had it on.

The Court: He may do it again. Turn the brim down.

(Witness puts the hat on his head.) 2996

By Mr. Solovei:

Q. Does the hat fit tight around the head? A. Yes, sir.

Mr. Solovei: That is all.

Mr. McGough: That is all.

The Court: Step down.

Mr. Solovei: Now I ask your Honor to instruct this jury that the questions that were propounded by the District Attorney, relative to guns found in the cellar, or 2997 guns alleged to have been on the defendant, and also about some pistol range, and also about the purchase of $40 or $50 worth of alleged haberdashery, the mere questioning by the District Attorney of this witness, the defendant Malinsky, is no evidence, and that the jury shall not under any consideration take it in their deliberation during the course of this trial.

The Court: They are so instructed. Proceed.

2998

Colloquy

Mr. Solovei: That is all I have at this moment. I expect a witness in the morning.

Mr. McGough: If that witness is about employment, I will make a concession.

The Court: Is that about employment?

Mr. Solovei: No, I would like to have him here, your Honor, and then, your Honor, it is only a question of five minutes.

2999

The Court: You are entitled to have him here.

Mr. Solovei: And I may have another witness that I expect, and if I do not have him here, the District Attorney can proceed.

The Court: Of course, you shall have every opportunity, Mr. Solovei.

Mr. Solovei: Thank you.

The Court: The Court is not going to restrict you.

Mr. McGough: I have requested and I would like to recall Rubin Jalkover.

3000

The Court: For further cross-examination?

Mr. McGough: Yes.

The Court: Bring him back.

Rubin Jalkover—Recalled for Deft. Rudish—Recross 3001

RUBIN JALKOVER, recalled.

Recross-examination by Mr. McGough:

Q. You testified here previously today, did you not, with reference to a conversation that took place sometime in the spring of 1941, is that right? A. Yes.

Q. Since that time, have you had an opportunity to have your recollection refreshed? A. 3002
I was talking to a few of the boys inside.

Q. What is the answer, "Yes", or "No"? Is your recollection refreshed? A. Well, through a conversation, I recalled a few things.

Q. And were you mistaken when you said it happened in 1941? A. Yes.

Mr. Morritt: Objection on behalf of the defendant Rudish.

The Court: Objection overruled.

Mr. Morritt: Exception.

By Mr. McGough: 3003

Q. What is your best recollection of the date of that conversation now, please? A. Well, talking to Davie there—

Q. Just give us the date, please. A. Repeat the question.

Mr. McGough: Will you repeat that question, Mr. Lehman?

(Question repeated by the stenographer as follows:

3004 *Rubin Jalkover—Recalled for Deft. Rudish—Recross*

"Q. What is your best recollection of the date of that conversation now, please?")

The Court: Point out to him the conversation you have in mind, Mr. McGough, so that there will be no mistake of what we are talking about.

Q. The conversation I have reference to, Jalk-
3005 over, is the one that you said took place between Malinsky and yourself at a time when Rudish was present. Do you recall that? A. Yes.

Q. And that took place, if my notes are correct, at 7th Street and Avenue D, is that correct? A. Yes, sir.

Q. And at that time, Dave Yellin, is supposed to have introduced Jake Rudish to Moish Malinsky, is that correct? A. Yes.

Q. Now with that in mind, please, will you tell me approximately when it was that that took place? A. It was either in the spring or the
3006 fall; it was warm weather. It was spring weather.

Q. What year? A. Well, I was talking to—

The Court: No, in what year?
The Witness: 1940.

By Mr. McGough:

Q. Is there any event that brings that particular year to your mind? A. Well, I was talking to Dave Yellin—

Q. Talking to who? A. Dave Yellin, and I recall that he came out of—

Rubin Jalkover—Recalled for Deft. Rudish—Redirect 3007

Mr. Solovei: I object to anything that was said betwen him and Dave Yellin.

By Mr. McGough:

Q. Don't give us the conversation, but tell us how you happened to fix the year 1940? A. He came out of prison, I think, I remember the month but it was nice weather in 1940 that I remember because I met him on 7th Street and Avenue C, around that section, and I was introduced to him by a friend of mine, whose name is Irving, who is in the Army now, and he used to hang around the corner there for some time; that was in 1940. 3008

Q. And how do you happen to fix this was in 1940? A. He came out of prison at that time.

Q. Who? A. And Davie Yellin.

Q. And did you know that for a fact? A. I didn't know he came out of prison until I was told by this friend of mine.

Q. And was that the time he came out? A. Yes, the summertime. 3009

Mr. McGough: That is all.

Redirect examination by Mr. Morritt:

Q. What is your name? A. Jalkover.

Q. A few minutes after, or within a short time after you took a seat, did a Court Officer come over to you? A. What is that?

Q. A few seconds after you took your seat, did a Court Officer come over to you? A. Yes, sir.

3010 *Rubin Jalkover—Recalled for Deft. Rudish—Redirect*

Q. Did he tell you to stay in the courtroom? A. He said to go out.

Q. What did this Court Officer tell you? A. He just told me to go out.

Q. Did you ever have anything to do with this Court Officer before? A. No, sir.

Q. But the Court Officer went over to you, didn't he? A. Yes.

Q. Point out the Court Officer. A. (No answer.)

3011

Q. Is he in the room? A. I don't see him.

Q. It was one of the Court Officers on duty in this courtroom, though, is that right? A. Yes.

Q. And he came over to you as you sat in your seat after you finished testifying, is that right? A. Yes.

Q. How long did you stay in the hall? A. A few seconds.

Q. What took place after you were in the hall?

Mr. McGough: That is objected to.

3012 The Court: Objection overruled.

The Witness: Well, we walked through the hall here.

By Mr. Morritt:

Q. Who is "we"? A. The Officer.

Q. Were you allowed to go and come as you pleased; yes or no?

Mr. McGough: That is objected to.

The Court: Objection overruled.

The Witness: (No answer.)

Rubin Jalkover—Recalled for Deft. Rudish—Redirect

By Mr. Morritt:

Q. Were you allowed to come and go as you were before you testified on the stand? A. Well, I was seated in the room with them.

Q. You came of your own free will, didn't you? A. Yes.

Q. You did not come here with a Court Officer, did you? A. No, sir.

Q. But after you finished testifying, the Court Officer came over to you? A. Yes, sir.

Q. And spoke to you, didn't he? A. Yes.

Q. Then he took you into custody? A. Took me in a room.

Q. Took you in a room? A. Yes, sir.

Q. Did you ask to be taken in a room? A. No, sir.

Q. You did not want to go in a room, did you?

Mr. McGough: That is objected to.

The Court: Objection overruled.

By Mr. Morritt:

Q. You did not want to go into a room? A. No, sir.

Q. How long did this Court Officer keep you there? A. Until now.

Q. How long? A. I was sitting there up until now.

Q. Where were you sitting up until now? A. One of the rooms in the building.

Q. Where? A. One of the rooms in the back.

Q. You did not ask to be taken there? A. No.

3016 *Rubin Jalkover—Recalled for Deft. Rudish—Redirect*

Q. You were detained there against your will, weren't you? A. Well, I was told to sit down.
Q. Pardon me? A. I was told to stay there.
Q. And what else were you told? Were you threatened? A. No, sir.

Mr. McGough: That is objected to.
The Court: He said "No, sir."

3017 By Mr. Morritt:

Q. You did not want to stay there, did you? A. No, I did not want to stay there.
Q. Pardon me? A. I did not want to stay there, naturally.
Q. Did you stay because the Court Officer came over to you? A. Yes.
Q. You were afraid you were going to be put into jail?

Mr. McGough: That is objected to.
The Witness: No, sir.

3018 By Mr. Morritt:

Q. Were you worried about something? A. No, sir.
Q. You are not afraid now? There is no reason for you to be afraid? A. No, there is no reason for me to be afraid.
Q. Where was this room that you were taken to by this Court Officer? A. On this floor.
Q. What did it look like? A. A large room; a table and a few chairs.
Q. Anybody else there? A. Yes.
Q. Who? A. Three or four detectives.

Rubin Jalkover—Recalled for Deft. Rudish—Redirect 3019

Q. Three or four detectives? A. Yes, I think they were detectives.

Q. Did they speak to you? A. Yes.

Q. What did they say to you? A. They asked me a lot of things.

Q. Because you testified before on the stand—

The Court: Mr. Morritt, you are opening the door, but I do not know what may develop. Of course, you are forewarned, aren't you? 3020

Mr. Morritt: I appreciate that.

The Court: Suppose you consult with your associates before you ask the question.

Mr. Morritt: I have, your Honor.

The Court: No, you have not, before asking the question.

Mr. Morritt: I respectfully take exception to your Honor's statement. I am conducting this examination.

The Court: Gentlemen of the jury, step out for a moment, please. 3021

(The jury retires from the courtroom.)

The Court: I am not supposed to be the lawyer for the defense, which I have tried to be on several occasions. These men are on trial for their lives. Your client is on trial for his life, and do you want to ask a question that may open up the door to a lot of damaging testimony against him. If you think that is good policy, pursue it, but you are so wrought up emotionally, as I watch you from here, that you do not even know or appreciate when a man is trying to do a

good turn for you, and you are so pugnacious and antagonistic that I sometimes wonder whether I should even try to assist you. I am trying to assist your client but you are too overwrought to understand that.

Mr. Morritt: May I respectfully—

The Court: When you ask this witness a question of that kind, it may open up
3023 the door to a flood of damaging testimony which does not belong in the case. Now, Mr. Morritt, you are an attorney and I do not propose to know any more than you do about the trial of a case. If you wish to press the question, I will let you ask it, but I thought it was my duty at least to forewarn you, and that you should consult with your experienced associates, who are good lawyers, too, whether you want to ask that question. I do that in the interests of your client.

Mr. Morritt: I respectfully take an
3024 exception to your Honor's statement.

The Court: Exception to what?

Mr. Morritt: You used the word "pugnacious".

The Court: There is no jury here so there is nothing wrong. Bring back the jury. You are concerned with yourself only now. I am concerned with your client. If you want to ask the question, proceed to ask it, and thereafter if something develops in answer to that question, that is damaging to your client, I will not strike it out.

Mr. Morritt: I take exception to your Honor's remarks.

The Court: Proceed. What are you taking exception to, to what? Proceed. Bring back the jury.

(The jury returns to the courtroom.)

The Court: Continue, please.

Mr. Morritt: No further questions, your Honor.

The Court: Do you withdraw that question, sir? There is a question on the record. 3026

Mr. Morritt: I withdraw it.

The Court: All right. Mr. Morritt, please feel at ease and at liberty to ask any other questions that you desire in the interests of your client by way of cross-examination of this witness. I hold now that you have the right to cross-examine him and you may consult with your other counsel and determine whether questions are to be asked at this time. Mr. Carabba, you are associated with Mr. Morritt? 3027

Mr. Carabba: Yes, I am. I thought I was the senior counsel here and Mr. Meadow is associated with us, too.

The Court: I will let you folks talk about that for a few moments to determine whether you desire to examine this witness any further.

Mr. Carabba: We have decided not to. We have had a conference in the absence of the jury at this time.

The Court: All right; proceed.

3028 *Rubin Falkover—Recalled for Deft. Rudish—Redirect*

By Mr. Solovei:

Q. This room that you were taken to this morning, after you testified, was a room which the District Attorney uses, is that correct? A. Yes, sir.

Q. What? A. Yes, sir.

Q. In the corner of this building, 'way at the end of the building, is that right? A. Yes, sir.

3029 Q. And there were a number of police officers and detectives there, is that right? A. Yes, sir.

Q. Don't shake your head, please. A. Yes.

Q. Are you scared of anybody now? A. No, sir.

Q. Will you talk up and take your hand away from your face? A. Yes.

Q. This room that you went to this morning, with one of the Court Attendants from here, that you were escorted to, you say you saw Dave Yellin there? A. Yes.

Q. Did you see Slip there? A. Yes, sir.

3030 Q. And you had a talk with Dave Yellin and Slip, is that right? A. Yes, sir.

Q. And you were really placed under arrest, isn't that correct? A. I was not placed under arrest that I know of.

Q. What? A. I was not placed under arrest that I know of.

Q. Didn't they tell you they are going to hold you for perjury? A. Yes.

Q. And didn't some police officers from here escort you over to this corner room? A. Yes, sir.

Q. And when you were told you were going to be held for perjury, then you were brought

3031

back here and recanted the testimony that you gave this morning, is that correct? A. Yes, sir.

Q. You are doing that only because you as a married man, who is now gainfully employed, do not want to be held on any charge, isn't that correct?

Mr. McGough: I object to that.
The Court: Objection overruled.
The Witness: Yes.

3032

By Mr. Solovei:

Q. You are using the road of least resistance for your own convenience, isn't that correct? A. No.

Q. What? A. No.

Q. But you did not feel this morning that you were committing perjury when you were testifying, did you? A. No.

Q. And you came here with the absolute intention of telling the truth, didn't you? A. Yes, sir.

3033

Q. Isn't that right? A. Yes, sir.

Q. As a matter of fact, you were examined by somebody connected with this case other than myself as to what you knew about this defendant Rudish, isn't that right? A. That is right.

Q. You never saw me in your life before you came to this courtroom, is that correct? A. Yes, sir.

Q. And you never spoke to me? A. Yes, sir.

Q. And when you spoke to that somebody, prior to your coming into this courtroom to testify, you toid them, did you not, that it was

3034 *Rubin Jalkover—Recalled for Deft. Rudish—Redirect*

in the spring of 1941 that you saw Yellin introduce Rudish to Malinsky, isn't that correct? A. That is right.

Q. And when you made that statement, as far as you know that statement was true, isn't that right? A. That is right.

Q. And after consultation with Mr. Dave Yellin and Mr. Slip Spielfogel, you came back this afternoon and you now say that you believe
3035 that the introduction was alleged to have taken place in the spring of 1940, is that right? A. Not the spring. It could have been the spring or fall; I don't remember.

Q. Now you say it could be the spring or fall of 1940, is that right? A. (No answer.)

Q. Will you please answer? A. Yes.

Q. They told you, as long as you put the introduction in the year 1940, it would be perfectly all right, is that correct? A. No.

Q. They wanted you to bring the introduction up to 1940, isn't that correct?

3036

Mr. McGough: May I register an objection?

The Court: The question is objectionable.

Mr. McGough: I guess it is understood this is not cross-examination. He has adopted this witness, is that correct?

The Court: I am going to hold now that he can cross-examine him to his heart's content.

Mr. McGough: It is new matter.

The Court: I know. You may be

right technically, but in the interests of justice, I am going to permit Mr. Solovei or any counsel to cross-examine to their heart's content.

By Mr. Solovei:

Q. How many detectives did you talk to in that little District Attorney's room at the end of this building? A. Three. 3038

Q. Three? A. Yes.

Q. Do you know their names? A. No, sir.

Q. And the three of them were questioning you within a radius of a few minutes? A. Yes.

Q. And three of them told you, did they not, unless your testimony is changed from 1941 to 1940, so as to make this introduction in the year 1940, you are going to be held for perjury, didn't they? A. No.

Q. You said you were talking to a few of the boys in the side room? A. Yes.

Q. Some of your pals in the side room that you were talking to? A. They are not my friends. 3039

Q. What do you mean when you use the words "a few of the boys"? Who do you mean by "a few of the boys"? A. There were three boys in there.

Q. Who were the boys that you were talking to? A. Dave Yellin.

Q. Yes? A. The fellow Slip.

Q. Yes? A. And another fellow, I think his name is Kovner.

Q. Kovner? A. Yes.

3040 *Rubin Jalkover—Recalled for Deft. Rudish—Redirect*

Q. Three boys from Sing Sing, is that right? A. I don't know where they are from.

Q. You know Dave Yellin is in Sing Sing doing 10 to 20 years? A. I know he is in prison but I don't know what prison he is in.

Q. You know he is doing 10 to 20 years? A. Yes, sir.

Q. And you know Mr. Slip is doing 30 to 60 years, don't you? A. Yes, sir.

3041 Q. And you knew Kovner is doing 15 to 30 years? A. I never saw the man in my life.

Q. Are they sitting there handcuffed? A. No, sir.

Q. Did you have anything to drink in there? A. I had coffee.

Q. For your lunch? A. I sent down for a sandwich and coffee.

Q. Did you have to buy your own lunch? A. Yes, sir.

Q. What? A. Yes, sir.

Q. They would not let you out for lunch? A. No.

3042 Q. Don't shake your head. A. No.

Mr. Solovei: That is all.

Mr. Morritt: May I ask one question?

The Court: Surely.

By Mr. Morritt:

Q. Did you ever see me in your life before? A. No, sir.

Mr. Morritt: That is all.

Rubin Jalkover—Recalled for Deft. Rudish—Redirect 3043

By Mr. Carabba:

Q. You never saw me in your life until you came to court this morning, is that correct? A. Yes, sir.

Mr. Carabba: That is all.

By Mr. Morritt:

3044

Q. And you told the story to counsel that you told the jury this morning when you were questioned?

Mr. McGough: I object to it. It is immaterial whether he did or not.

The Court: Objection sustained.

Mr. Morritt: I respectfully except.

The Court: Proceed.

By Mr. Morritt:

3045

Q. The ones who refreshed your recollection were Spielfogel, Kovner and Yellin, this afternoon, is that right? A. Yes, sir.

Q. They were the ones who refreshed your recollection, that you might be mistaken? A. Yes, sir.

Q. Is that so? A. Yes, sir.

Q. Are you afraid of Spielfogel, Yellin and Kovner? A. No, sir.

The Court: Talk up.

The Witness: No, sir.

Q. Do you know their reputations?

3046 *Rubin Jalkover—Recalled for Deft. Rudish—Recross*

Mr. McGough: That is objected to.
The Court: Objection overruled.

By Mr. Morritt:

Q. Do you know their reputations? A. Yes, sir.
Q. Do you know their friends? A. No, sir.
Q. You know they got friends, don't you? A. Yes, sir.

3047

Mr. Morritt: That is all.

By Mr. McGough:

Q. Were you honestly mistaken this morning?

Mr. Morritt: I object.
The Court: Objection overruled.
Mr. Morritt: Exception.
The Witness: After talking—

3048 By Mr. McGough:

Q. Were you honestly mistaken, Yes or No, this morning? A. Yes, it could have been 1940.
Q. After you had a chance and after talking about when Yellin was released from prison, you then remembered the right date was 1940? A. Yes, I started to remember because I had met him a few weeks after he came out.
Q. When did he come out, do you remember? A. I don't know exactly. I know it was the summertime because it was pretty warm.

Mr. McGough: That is all.

3049

The Court: It is now 5:45 p. m. We are about to take a recess, Gentlemen of the jury, until tomorrow morning at 10 o'clock. I must admonish you again not to discuss the case either among yourselves or with any other persons, or permit anyone to speak to you about this case, or discuss it in your presence. You must keep your minds open and do not form or express any opinion or conclusion as to the guilt or innocence of the defendants 3050
on trial, or either of them or any of them until the case is finally submitted to you by the Court and after a charge on the law. Refrain from reading anything in the papers concerning this case. You may retire and return tomorrow morning at 10 o'clock.

(The jury retired from the courtroom.)

The Court: The defendants are remanded.

Recess to 10 a. m., June 22, 1943. 3051

3052 *Earl N. Bagnall—For Deft. Malinsky—Direct*

Brooklyn, N. Y., June 22, 1943.
10 A.M.

AFTER RECESS.

TRIAL RESUMED AND ROLL CALLED.

EARL N. BAGNALL, residing at 4746 40th Street, Sunnyside, Long Island, called as a witness in behalf of the defendar Malinsky, being
3053 first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. Solovei:

Q. What firm are you connected with? A. With the H. A. Johnson Company, Incorporated.

Q. What kind of firm is that? A. Wholesale bakery and confectionery.

Q. Do they do trucking? A. They do, sir.

Q. Somebody do the trucking for them? A. John J. Casale.

Q. Where is John J. Casale's place of busi-
3054 ness? A. They are 510 West 24th Street, New York City.

Q. Do you know the defendant Morris Malinsky? A. Yes, sir, I do.

Q. What is your position? A. Manager.

Q. H. A. Johnson or John A. Casale? A. No; with H. A. Johnson.

Q. Is it a subsidiary of John J. Casale, Incorporated? A. No, sir; they rent the trucks from John J. Casale.

Q. How long have you known the defendant,

Morris Malinsky? A. According to our records, one year.

Q. He worked for your firm? A. Yes, sir.

Q. Under your supervision? A. Yes, sir.

Q. From when to when, can you tell us? A. From 7:30 in the morning until different hours of the night.

Q. I mean from what month and year? A. From October 25th, 1941 to October 24th, 1942, according to our records.

Q. The records that you had, did you turn your records over to the District Attorney's office? A. I did, sir. 3056

The Court: What materiality has that in this case, that he worked from October of 1941 until October of 1942?

Mr. Solovei: I am showing continuous employment from the time he left Elmira to the time of the day of his arrest. That is the materiality.

The Court: All right; proceed.

By Mr. Solovei: 3057

Q. How much did he make a week as a salary?

Mr. McGough: I object.

The Court: Sustained.

Mr. Solovei: Exception.

By Mr. Solovei:

Q. While he worked for your firm, was he always a hard working, industrious young man?

3058

Mr. McGough: Objection.
The Court: Sustained.
Mr. Solovei: Exception.
The Court: If you wish to prove character, prove it in the proper way.
Mr. Solovei: No; I am not proving character.

By Mr. Solovei:

3059 Q. The records from your office, did you deliver them to the District Attorney's office?

Mr. McGough: I object to it, it is immaterial whether he did or not.
The Court: Sustained.
Mr. Solovei: Exception.

By Mr. Solovei:

Q. While working for your firm, did you always find him to be a conscientious, hard worker?

3060

Mr. McGough: I object.
The Court: Sustained.
Mr. Solovei: Exception.

By Mr. Solovei:

Q. Did he work every day from October 24th or 25th, 1941, to October 24th or 25th, 1942, or 23rd, whenever it was you said?

Mr. McGough: Objection.
The Court: Sustained.
Mr. Solovei: Exception. I also offer

this, if your Honor pleases, for the further purpose to show that the testimony of one of the People's witnesses, wherein he testified in this court that the defendant Malinsky said—using his language that he was on the lam—that this defendant worked from the time he left Elmira to the date of his arrest.

The Court: You establish that. As to what his salary was, what kind of workman he was, that is immaterial. 3062

Mr. Solovei: I just asked him if he worked every day and your Honor sustained the objection.

The Court: No; I did not. I permitted you to prove through this witness, that this man was regularly employed from October 25th, 1941 to October 24th, 1942. That may stand.

By Mr. Solovei:

Q. Did he work every day? A. Why, according to the records, he did; yes, sir. 3063

Mr. Solovei: That is all.

Mr. McGough: Step down; no questions.

Mr. Solovei: The defendant Malinsky rests.

Mr. McGough: I would like to call some rebuttal.

3064 *Harold Gruder—Rebuttal for People—Direct*

HAROLD GRUDER, residing at 385 Argyle Road, Brooklyn, called as a witness in behalf of the People, in rebuttal, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Mr. Gruder, what is your occupation, please? A. Restaurant owner.

Q. What is the name of your restaurant? A.
3065 S. & H. Restaurant.

Q. Where is it located, please? A. Stillwell Avenue.

Q. Stillwell and where? A. Stillwell and Surf.

Q. That is Coney Island, is that right? A. That is right.

Q. How long have you operated the S. & H. Restaurant? A. 18 years.

Q. Were you there around the Fall of 1940 and the Spring of 1941? A. Yes, sir.

Q. I want you to look at the defendant Indovino, the man sitting on the far side; did you
3066 ever see him in the S. & H. Restaurant in Coney Island? A. Which one is that?

Mr. Morrit: I object to that.
Mr. Carabba: I object to that.
The Court: Sustained.

By Mr. McGough:

Q. Look at the three defendants, and tell me whether you ever saw any of them in the S. & H. Restaurant?

Mr. Solovei: I object unless the time is fixed.

Mr. Geoghan: I object to it as to Indovino for the same reason.

Mr. McGough: I will fix the time as about 1940 or 1941?

A. This gentleman on the far end.

The Court: Go down, step off the stand and put your hand on his shoulder. 3068

(Witness goes down into the courtroom and puts his hand on the shoulder of the defendant Indovino.)

Mr. McGough: I want the record to indicate that he touched the defendant Indovino.

By Mr. McGough:

Q. Do you know his name? A. No, sir.

Q. You have seen him in your place at that time, have you, 1940 and 1941? A. I would not say what year it was. I have seen him in the 3069 place.

Q. Have you seen him there in the last year? A. No, sir.

Mr. Geoghan: I move to strike out his testimony.

The Court: Strike it out. The jury is instructed to disregard it. If he cannot fix the time he saw him there—he saw him in the restaurant.

Mr. McGough: Let me ask, your Honor, one or two questions.

3070 By Mr. McGough:

Q. Do you recall the date that Patrolman Leon Fox was killed? A. Yes.

Q. Did you know Leon Fox? A. Yes.

Q. With that date in mind can you tell us whether or not you saw this defendant there at any time thereabouts? A. I could not, sir, tell.

Mr. Geoghan: Same motion.

3071 The Court: Motion granted.

By Mr. McGough:

Q. Can you fix any date that you saw him there last? A. All I can say I saw him during the years I was there; whether it was two years ago or three years ago I could not say.

Q. Would it be more than three years ago? A. I think so.

Q. When would be the last time you saw him there if you recall? A. I cannot recall.

3072 The Court: The motion of Mr. Geoghan to strike out his testimony is granted, and the jury is instructed to disregard it. It is absolutely meaningless, gentlemen, of no value whatsoever. You must disregard it entirely.

Abraham Kaye—Rebuttal for People—Direct 3073

ABRAHAM KAYE, residing at 101 Lincoln Road, Brooklyn, N. Y., called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testifies as follows:

Direct examination by Mr. McGough:

Q. Mr. Kaye, what is your business, please? A. My business? I am a waiter.

Q. Where do you work? A. In the Famous Bar & Grill. 3074

Q. Where is the Famous Bar & Grill located, Mr. Kaye? A. Surf Avenue, Coney Island.

Q. Next to the Coney Island Theater? A. Yes.

Q. How long have you been there as a waiter? A. Seven years.

Q. Do you know—

Mr. Morritt: I wish the District Attorney—I except to the District Attorney's pointing.

Mr. McGough: I cannot point if he is in the way. 3075

Mr. Multer: He was in the way when you started pointing.

The Court: He has not pointed at anybody yet.

Q. Will you look at the defendant Indovino, please.

Mr. Morritt: I object to that. That was my objection.

Mr. Geoghan: I object to that.

3076 *Abraham Kaye—Rebuttal for People—Direct*

Mr. Carabba: That is not fair after he has been admonished.

The Court: All right; I will take care of it.

By the Court:

Q. Mr. Kaye, look around this courtroom, and see if you recognize anybody who patronized your restaurant; and after that we will get the time, if he identifies him. Just go down and go around this whole courtroom, and look all around, see if you can pick out anybody that you recognize as having been in your restaurant?

3077

(The witness goes down in front of the counsel table and points to the defendant Indovino.)

Q. Put your hand on the man that you recognize, if you do. A. (Witness puts his hand on the defendant Indovino.)

Mr. McGough: I want the record to indicate he has put his hand on the shoulder of the defendant Indovino.

3078

The Court: All right; come back.

Mr. Geoghan: May I also have the record indicate that he walked directly from the witness stand right over to Indovino and to no other person in the courtroom.

The Court: The record may also indicate that he looked at the three defendants. That is right, Mr. Geoghan, isn't it, he looked at each one of the defendants?

Mr. Geoghan: I don't know. It is for the jury to determine that.

The Court: All right; the jury will be guided by their own observation.

By Mr. McGough:

Q. Now, Mr. Kaye, have you seen him down there in the last year? A. No.

Q. Can you tell us when it was that you saw him there the last time that you recall? A. Oh, I did not see him a couple of years there.

Q. A couple of years? A. Yes, maybe three; 3080
over three years.

Q. Over three years? A. Even when the case was, the Fox case, I did not see him about six or eight months, I did not see him.

Q. Did not see him before the Fox case? A. No; I did not see him after that.

Q. Before the Fox case, how many times did you see him in that year? A. I cannot tell.

Mr. Geoghan: I object to the question as too general.

A. You know, the most they used to come I was 3081
there on Sunday, and that is very busy. I cannot pick out, you know—ten thousand people comes in the dining room—but I know when I see him he used to come over there.

By Mr. McGough:

Q. Have you waited on him? A. Yes; this fellow. The rest I did not remember; maybe yes, maybe no.

Mr. Geoghan: I object to the testimony of this witness. He does not fix any time.

The Court: He said he saw Indovino there about six or eight months before the Fox case—that was the last time he saw him.

Mr. Geoghan: I still press my motion. What is the materiality of it.

The Court: Is that the sum of it?

Mr. McGough: Yes; and I want to point out to your Honor that this defendant on the stand said he was never in
3083 there.

The Court: Aside from that, there is testimony here by the witness Yellin, I believe, that Indovino is alleged to have said, "I cannot go out on this job or stick-up or trick, because I am well known".

Mr. McGough: That is right.

The Court: (Continuing) "In Coney Island." Therefore, I will let this testimony stand, Mr. Geoghan.

Mr. Geoghan: I respectfully except.

3084 *Cross-examination by Mr. Geoghan:*

Q. How long have you been a waiter in that restaurant? A. Seven years—since it was opened.

Q. You have waited on, as you say, I think, thousands and thousands of people? A. Yes, sure.

Q. How many people come in there on an average during the time that you are working there? A. Every day?

Q. Yes. A. In the day? Who knows? I have no records of that.

Q. Would you say three or four hundred? A. Every day? No.

Q. A couple of hundred? A. About a hundred. Saturday—the main thing is Saturday and Sunday business.

Q. Are there other bartenders in that place besides you? A. Oh, yes, sure.

Q. How many are on at the same time? A. On the floor was only two waiters in the season. Winter time is only one—me—I am the steady man. 3086

Q. Of course, you don't make a notation of everybody that comes in the place, do you? A. No.

Q. You just, you say, remember faces of people as they come in? A. That is all; what I have seen many times their faces; but I did not know—

Q. It is a pretty busy place? A. Oh, yes.

Q. You haven't got much time to talk to people, have you? A. Oh, no.

Q. Keep you busy mixing drinks? A. You see the business—there is no checks; it is C.O.D. I go and I collect, and that is all. 3087

Q. In other words, you mix drinks? A. No; I don't mix the drinks.

Q. You are a waiter? A. I am a waiter.

Q. In other words, you serve the customers at the table? A. Yes.

Q. You don't engage in conversation with them? A. No.

Q. Have no time? A. No.

Q. Very busy? A. Yes.

Q. Serve their meals and pass the check over —do you collect the money or do they pay on

the way out? A. No; I collect what I serve. The most thing, it is self-service; the mostly it is the people coming and serve self.

Q. In your place? A. Some fellows they come and take it their selves. I have nothing to do with these people.

Q. Who spoke to you first about this case? A. About that case?

Q. About your coming here as a witness? A. Nobody spoke to me. When the case was, the
3089 Fox case, they picked up a couple of people in the place there by the name of—

Mr. Geoghan: I object to this.

Q. Please answer my question. Who spoke to you about coming here today to testify in this case? A. The District Attorney called me.

Q. You mean, Mr. McGough? A. Yes; Mr. McGough.

Q. You mean, he went down to your home last night? A. Yes; they wanted me yesterday—was in my place—but I was working—they told me
3090 to come here.

Q. Had you ever been questioned before by the District Attorney? A. No; that is the first time.

Q. That is the first time? A. The first time.

Q. Never questioned by the police? A. Yes; sure.

Q. When? A. A couple of years ago, last year, that was—a couple of times in Eighth Street, in Coney Island.

Q. You told them then? A. I told them—

Mr. Geoghan: I withdraw that.

Q. They asked you certain questions about the Fox murder? You answered their questions? A. I told them I did not know, I did not see. They showed me the pictures.

Q. Oh, yes; tell us about that? A. They showed me the pictures, do I know people used to come here, and I know. I told them I did not know everybody—I cannot remember. One man, the same man what I pointed, just strikes to me that I saw him many times years ago.

Q. You did not see the picture of this man you say you saw many times? A. Yes; I saw the picture the first time the Fox case was.

Q. The police showed you? A. The police showed me.

Q. They asked you if you ever saw him? A. Did I know him personally. I did not know him, I only know the face when I saw him, he used to come here.

Q. How long ago was that? A. Two years ago, I would say, 1941.

Q. 1941? A. Yes.

Q. Do you recall when the patrolman was killed, don't you? A. Yes.

Q. You read about it, I assume? A. Yes; I read in the papers.

Q. Was it very shortly after that that they spoke to you, that is, the police, about this case? A. I could not tell what time, how many months; a couple of months, or six months.

Q. It was after the Fox case? A. After that; yes.

Q. At that time you told the police that you saw this— A. Saw that gentleman; I saw him many times.

3094 Q. How long before? A. Oh, I cannot remember. Maybe I saw him three or four or six months before; but I did not see him a long time.

Q. You don't remember? A. No.

Q. You could not say definitely? A. No; because they used to come, the whole bunch together.

By the Court:

Q. Who came in a whole bunch together? A.
3095 The same young fellows.

Q. Who came in a bunch? I wish you would point out. A. I do point—this fellow I know him. They came with the bunch—together; I didn't pay attention to who is there. Very seldom I serve them—used to come and take themselves a sandwich and a glass of beer.

By Mr. Geoghan:

Q. That was several months before the Fox case? A. Yes.

Q. It might have been a year before, is that right? A. No, no. That case was, I think it
3096 was Winter; and that is in the same time, may be three or four months before.

Q. Three or four months before? A. I remember the case was on Saturday, that was after that I don't see him no more.

Q. But the first time you were asked to come here for a witness, to serve as a witness in this case, was last night? A. Last night?

Q. You were not asked to come here as a witness, as a witness for the People, until last night? A. Yes.

Q. That is the first time? A. Yes.

Redirect examination by Mr. McGough:

Q. You received a telegram, didn't you? A. No. Maybe my house, yes, before I left home.

Q. Did a detective come to your place of business? A. Yes; last night, I received a call from my daughter. I supposed you called up in my hous They told me, you know, there is a telegram, or a call.

Q. Did you come down here today after you were told? A. Yes.

Q. I saw you in Coney Island about two months ago, didn't I? A. Yes; you can see me every day in Coney Island.

Q. I mean a couple of months ago, I walked in your place of business with the detectives? Remember that? A. Yes; I remember that.

Q. I had some men there, we had a car; I spoke to you for a minute or so.

Mr. Morrit: I object to this, please telling him.

By Mr. Geoghan:

Q. Did anybody point Inderieri out before you took the witness stand today, tell you just where he was sitting? A. No.

Q. Sure of that? A. I am sure.

3100 *Harry Drobner—Rebuttal for People—Direct*

HARRY DROBNER, residing at 85 Morton Street, Brooklyn, N. Y., called as a witness in behalf of the People, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. Your name is Harry Drobner? A. Yes, sir.

Q. What is your business, Mr. Drobner? A.
3101 I am a haberdasher.

Q. Under what name do you conduct your haberdashery business? A. Toby Dunn Store.

Q. Before you went in the haberdashery business were you known as Toby Dunn? A. That is right, sir.

Q. In what circles? A. In the boxing circles.

Q. Were you a professional boxer? A. No, sir.

Q. Did you box under the name Toby Dunn? A. Yes, sir.

Q. In February, 1941, where was your place of business? A. 147 Clinton Street.

3102 Q. Was that a store that went in from the street or did you go down? A. Basement.

Q. Do you know this defendant, Morris Malinsky, Mr. Drobner? A. Yes, sir; I do.

Q. Did he ever buy any merchandise in your store? A. Yes.

Q. With reference to the year 1941, do you recall making a sale? A. For the year, 1941? Yes, sir.

Q. About what particular month if you remember, please? A. Well, it could have been the latter part of February or the earlier part

of March, because I will tell you why; I was moving to 148 Clinton Street, and I was making preparations to move across the street into a straight store, a bigger store.

Q. Where you are now? A. Where I am now.

Q. Can you tell this Court and jury the amount of merchandise that Malinsky bought from you at that time? A. Mr. Malinsky—

Mr. Solovei: I object to the question.
The Court: Sustained. 3104

Q. At that time, Mr. Drobner, did you sell some articles of haberdashery to Malinsky?

Mr. Solovei: I object to it.
The Court: Sustained.

By Mr. McGough:

Q. Was Malinsky in your store at that time? A. During the latter part of February or earlier part of March?

3105

Mr. Solovei: I object to it.
The Court: Just yes or no.

A. Yes, sir.

Q. Did he speak to you at that time? A. Yes, sir.

Q. Please tell us what he said to you and what, if anything, you said to him.

Mr. Solovei: I object to that unless it is connected with this case.
The Court: I cannot tell, Mr. Solovei.

3106 *Colloquy*

Mr. Solovei: You can ask the District Attorney whether or not, your Honor. If this man is going to give us conversation, then your Honor is going to strike it out, if it is not in connection with this case, of course. If it is in connection with this case, of course, I won't make any objection.

Mr. McGough: Does your Honor sense the purpose of it or shall I advance to the
3107 bench?

The Court: I understand the purpose of it—in line with your cross-examination of Malinsky yesterday.

Mr. McGough: That is right.

The Court: These are collateral matters by which you are bound.

Mr. McGough: I don't think so, Judge. I would like to point out the real reason, out of the hearing of the jury.

The Court: You can come up here and tell me privately.

3108 (Mr. McGough confers with the Court at the bench.)

The Court: All right, objection sustained. (To the witness) Step down. I am going to sustain the objection.

Mr. Solovei: I move to strike out his testimony.

The Court: Strike it out.

EDWARD GROEHL, residing at 301 East 7th Street, Manhattan, called as a witness in behalf of the People, in rebuttal, being first duly sworn by the clerk, Mr. Jehle, testified as follows:

Direct examination by Mr. McGough:

Q. What is your business, please? A. Candy store.

Q. Where do you operate your candy store? A. Avenue D and 7th Street, on the corner of 7th Street. 3110

Q. On the corner of 7th Street and Avenue D? A. Yes.

Q. Do you know these three defendants sitting here in court? A. I am near-sighted. Can I step down and take a look?

The Court: He wants to step down and take a look, he says.

Mr. McGough: All right.

(The witness goes down into the court-room and passes in front of the counsel table.) 3111

A. (Pointing). That one fellow, Moish.

The Court: Go over and put your hand on him.

The Witness: Moish.

The Court: Put your hand on him.

(The witness puts his hand on Malinsky.)

By Mr. McGough:

Q. Anybody else? A. This fellow here (pointing to Rudish.)

Q. Go over and touch him. A. (The witness touches Rudish.)

Q. Rudish? A. Yes; he had a store right down 7th Street.

Q. Who had a store? A. Rudish.

Q. Anybody else? A. I remember that fellow used to come in the store (pointing to Indovino.)

Mr. McCough: (Indicating Indovino.)

By Mr. McGough:

Q. Now, Mr. Groehl, did you see those three men in your store at any time together? A. There was a bunch of boys used to come in.

The Court: Listen to the question.

A. They came in together on Sunday morning in the store buying sodas, cigars: that is all.

By Mr. McGough:

Q. And you say that Rudish had a store, an auto repair store? A. Yes.

Q. Was that in the same building as yours or next door? A. No; in the same building, it is in the same building.

Q. What street would that be on, the store? A. On 7th Street.

Q. That would be around the corner from Avenue D? A. That is right.

Mr. Carabba: I ask this testimony be stricken out, on behalf of the defendant Rudish; on the ground the People have

not proved when this witness said he saw them together; no time specified.

The Court: Overruled.

Mr. Carabba: Exception.

Mr. Geoghan: I make the same motion on behalf of Indovino.

The Court: I believe Rudish testified he never saw Indovino in his life until he saw him in the Hotel Bossert. Isn't that the testimony? Now this witness comes along and says, the three of them were in 3116
the store together. It doesn't make any difference when they were together.

Mr. Morritt: I respectfully take exception to your Honor's remark. I don't believe there is such testimony that they were there together.

The Court: Am I incorrect in my recital of the testimony?

Mr. McGough: No; that is correct, Judge, my recollection.

The Court: If I am incorrect, I will withdraw it. Let us make sure. Ask the 3117
witness. Mr. Morritt says, I am incorrect in commenting on this testimony.

Mr. Morritt: I respectfully submit he testified there was a bunch of boys in his place. He never said the defendants were in there together.

(The following answer read: "They came in together on Sunday morning buying sodas, cigars; that is all.")

The Witness: I did not say that.

The Court: I think thus far I am correct.

Mr. Morritt: I am sorry. I might not have heard that.

The Court: That is right. The acoustics are very bad. In view of his testimony they came in together, therefore, I think this testimony is competent, because Rudish testified that he never saw Indovino before in his life until he saw him in the Hotel Bossert. Indovino testified to the same effect. You gentlemen may cross-examine the witness.

Mr. Solovei: Will you permit the witness to make the voluntary statement he made in answer to your Honor's statement when you said something about coming in together, about never saying something.

By the Court:

Q. If you want to say something, I would like to have you talk up loud. A. I did not say they came in four together. I said I seen them in the store, but I did not see them all three come together. My place is a candy store; but I said I saw them in the store—There is a bunch of boys coming in.

The Court: Mr. Morritt you make your objection again?

Mr. Morritt: Yes, your Honor. I move to strike out his testimony; yes.

The Court: Your objection is still overruled, for this reason: that Indovino has testified unqualifiedly that he was never

in the locality of the East Side in his life, I believe that is what he said.

Mr. Geoghan: That is correct.

Mr. McGough: Does not know what the East Side looks like, is his language.

The Court: In view of that testimony, I am going to let this witness's testimony stand. You have your exception.

Mr. Geoghan: I object to it on behalf of Indovino, of course.

The Court: Yes, Mr. Geoghan. 312

Cross-examination by Mr. Geoghan:

Q. You don't know what time that was, do you? A. No.

Q. Not the slightest idea? A. No. It is always people coming in and going, and time does not mean—a business like mine time don't mean anything. I open up my store at six o'clock. Time in my store don't mean anything because I open up my store at six o'clock in the morning, always in a hurry, never look at the time, never, until I have a relief—I close my store at one o'clock at night. 312

Q. So the time you saw these three men in your store, as far as you are concerned, might have been three or four years ago; is that right? A. No: it ain't no three or four years.

Q. How long have you had that store? A. About three and a half years.

Q. Was it right around the time you opened up? A. No.

Q. How long after? A. About a year and a half—no; about 1941.

Q. A year and a half ago? A. About 1941.

Q. What time of day? A. Yes; coming in, I will see them maybe three or four times a day; maybe I see them once in a week. I say I seen the boys several times.

Q. Got a small store? A. This is a big store there, there are about 30 or 40 boys coming in the store.

Q. You are nearsighted, you say? A. Yes.

3125 Q. From where you are sitting now and where these gentlemen are sitting at the table, you could not distinguish them very well, could you? A. They come over to the counter. The store ain't so big as from here to there. They come over to the counter and buy cigars; and I spoke to Moish—the other fellow I don't know.

Q. You know Moish very well? A. Yes.

Q. Know Rudish very well? A. Yes.

Q. Indovino, you don't? A. I seen him in the store; I served him.

Q. That is, you say about a year and a half ago? A. About 1941.

3126 Q. Did the police ever question you about this case? A. About which case?

Q. About the Fox case, the case that you are testifying in? A. They asked me if I know him.

Q. How long ago is that? A. Yesterday.

Q. Just yesterday? A. Yes.

Q. That is the first time? A. That is right.

Mr. Geoghan: No more questions.

A. (Continued) Excuse me; it was Saturday they were there, too.

By Mr. Geoghan:

Q. That is last Saturday? A. No; this Saturday that passed.

Q. This is now Tuesday? A. Yes—Saturday.

Q. You mean the Saturday that passed? A. Yes.

Q. Just past. And never until that time were you questioned at all by the police? A. No, sir.

Q. Or by the District Attorney? A. No, sir.

Q. Nobody ever came over to your store to ask you what you knew about this case? A. No, 3128
sir.

Q. Or any of these men that you have pointed out? A. No, sir.

Q. Until Saturday? A. Yes.

Mr. Morritt: The defendant Rudish moves to strike out—

(At this point a man was brought into the court-room).

By Mr. Geoghan:

Q. Take a look at this man standing right here. Did you ever see him in your store? Take 3129
a good look at this man? Did you ever see him in your store? A. No.

Q. Sure of that? A. I would not say I am sure, but I don't know him. There is so many people coming into the store. You know in a store where people coming in, sometimes if I see people several times I could recognize them. I don't recognize this man.

Q. You see lots of people that resemble one another, don't you? A. I don't know.

Q. Coming in and out of your store? A. Sometimes they do resemble.

Q. So when you pick out Indovino here, this

130 *Edward Grochl—Rebuttal for People—Redirect*

man on the end, what you mean to say is, is it not, that he resembles somebody that comes into your store? A. I know him, because I served him a few times.

Q. You served somebody that looked like him? A. It is possible that I could have made a mistake—it is possible.

Q. So you are not sure of that? A. I cannot swear for it.

131 (The man who was brought into the room gives his name as Biagio Tranchese, 2111 Pacific Street, Brooklyn).

Redirect examination by Mr. McGough:

Q. Jack's Auto Repair store, that you say is in your building, did you see these three men together at that place?

Mr. Carabba: Object to the form of the question; leading and highly improper.

The Court: Sustained. Put it in a dif-
132 ferent form.

By Mr. McGough:

Q. With respect to the man that you say you might make a mistake, on Indovino, did you see him at Jack's Auto Repair store? A. I never went into Jack's Auto Repair store; was never in there.

Mr. Carabba: The defendant Rudish moves to strike out all of this witness's testimony as incompetent, irrelevant and immaterial.

The Court: Motion denied.

Mr. Carabba: Exception.

Mr. Geoghan: I make the same motion on behalf of Indovino. He says he cannot swear to it. That is his answer.

The Court: Motion granted.

Mr. Carabba: I understand your Honor's ruling to be that you deny it as far as the defendant Rudish is concerned?

The Court: Yes.

Mr. Carabba: He said he could not 3134
tell, could not tell whether they ever were together in the store.

The Court: He did not say they were together. There is no such testimony, in view of the witness's correction.

Mr. Geoghan: My motion?

The Court: Granted.

Mr. Geoghan: It is necessary that your Honor instruct the jury at this time to disregard this testimony as far as Indovino is concerned.

The Court: The jury is so instructed. 3135

PETER SHAMIN, recalled by the People, in rebuttal, having been previously duly sworn, testified as follows:

Direct examination by Mr. McGough:

Q. You testified here previously, did you not?
A. Yes, sir.
Q. You told us that you worked Saturdays

during the winter of 1940 and 1941 at Rauch's five and ten cent store; do you remember that? A. Yes, sir.

Q. I think you told us also, did you not, that at that time Morris Malinsky worked there, right? A. Yes, sir.

Q. Do you recall some time in the month of February, 1941, Malinsky asking you to get a package out of a hallway? A. Yes, sir.

3137 Mr. Solovei: I object to the question. That has been gone over before and your Honor struck it out. 'He is bringing this man back again.'

Mr. McGeorge: Your Honor told me at that time it might be entertained later in the trial.

The Court: I am going to permit the District Attorney to ask this witness questions. Exception to the defendants.

By Mr. McGeorge:

3138 Q. Now, Peter, can you fix for us the time in February, 1941, when that conversation took place between you and Malinsky? A. Yes, sir.

Q. When was it, please? A. It was about the middle of February.

Q. Now what time of the day was it on Saturday? A. It was about four o'clock.

Q. Tell this Court and jury, please, what Malinsky said to you and what if anything you said and did after he spoke to you?

Mr. Solovei: Object to it on the ground

it is incompetent, irrelevant and immaterial.

The Court: (To the jury). Will you gentlemen please step out for a few minutes—just in the hall. Don't discuss the case, keep your minds open. I will call you back very shortly.

(The jury left the room, and while they were out discussion was had as to the admissibility of the testimony sought to be elicited by the last question). 3140

The Court: Do you press the question, Mr. District Attorney?

Mr. McGough: Yes.

The Court: Objection overruled.

Mr. Solomon: I except.

The Court: If you have anything more to offer I will be glad to hear you. I suppose you have said everything you care to say?

Mr. Solomon: I am just making a general objection about it as incompetent, irrelevant and immaterial, not within the issues in the case, and the District Attorney by this witness is trying to show that a separate and distinct crime, if any at all, has been committed by this defendant, in violation of his rights, entirely collateral to the issues here. 3141

The Court: Is that your object?

Mr. McGough: No, that is not my object. My object is to connect this particular witness and his testimony to the incident that happened that night with

reference to Patrolman Fox out in Coney Island.

The Court: You mean with reference to the package?

Mr. McGough: With reference to the package only; that is right.

(At this point the jury was brought back to the room).

The Court: All right, gentlemen, proceed.

(Question read).

A. Malinsky told me, "Go get the bag of pieces in the hall—they are between the napkin boxes—and put them in the toilet."

By Mr. McGough:

Q. Is the hallway where you testified the merchandise was kept on Saturday? A. Yes, sir.

Q. After he told you that what did you do?

Mr. Solovei: Object to it.

The Court: Overruled.

Mr. Solovei: I move to strike out his previous answer.

The Court: Motion denied.

Mr. Solovei: Exception.

The Court: Go ahead.

A. I went and got that bag

By Mr. McGough:

Q. Did you pick it up? A. Yes, sir.

Q. Tell the Court and jury, describe that package, please?

Mr. Solovei: Object to that.
The Court: Overruled.
Mr. Solovei: Exception.

A. That bag was hard and it was heavy. It was about that big.
Q. Bag was about how large? A. About that big. 3146

Mr. McGough: Indicating ten or twelve inches for the record.

By Mr. McGough:

Q. About how wide, please? A. About that wide (indicating).
Q. About six inches wide? A. Yes.
Q. What color paper was the package wrapped in? A. The bag was a brown bag.
Q. Any wrappings on the paper? A. There was a piece of twine around it. 3147

The Court: He calls it a bag. I want a little more description of this.

Q. You told us a minute ago it was a brown paper bag; is that right? A. Yes.
Q. Can you describe that bag, please, a little bit more clearly?

Mr. Solovei: Object to it.
The Court: Overruled.
Mr. Solovei: Exception.

3148 *Peter Shamin—Rebuttal for People—Direct*

A. That bag, in parlance, must have been about a nine pound bag.

By Mr. McGough:

Q. Was it one bag or more than one?

Mr. Solovei: Object to that and move to strike the answer out.

The Court: Objection overruled, motion denied.

3149 Mr. Solovei: Exception.

By Mr. McGough:

Q. Was this one bag or did you see more than one bag? A. I only seen one bag.

Q. I mean, was the package wrapped in one bag or was it wrapped in more than one? Was it one bag inside of another as you saw it? A. No; I did not see another bag inside.

Q. Heavy paper or light paper? A. Heavy paper.

3150 Q. You say you picked that package up? A. Yes.

Q. Was it heavy or light? A. It was heavy.

Q. Did you feel the package? A. Yes, sir.

Q. What did you feel?

Mr. Solovei: Object to that.

The Court: He may state what he felt.

A. I felt the butt of a gun.

Mr. Solovei: Object to it and move to strike the answer out.

The Court: Motion denied.
Mr. Solovei: Exception.

By Mr. McGough:

Q. After you picked the package up, Peter, what did you do with it? A. I did as I was told; I took it into the toilet.

Q. Where did you place it? A. I placed it underneath the sink of the toilet.

Q. What did you do then? A. I ran out. 3152

Q. Did you see Malinsky? A. Yes, sir.

Q. What did you see him do after you come out of the toilet? A. He went straight in.

Q. Did you wait there to see if he came out? A. No, sir.

Q. What time did Malinsky go to supper that night? A. It was about seven o'clock.

Q. Up to the time you went to supper had he returned? A. No, sir.

Q. What time did you come back—excuse me—what time did you leave for supper? A. I left about 45 minutes after him, about 7:45.

Q. Quarter to eight? A. Yes. 3153

Q. How long did you take for your evening meal? A. About 40, 45 minutes.

Q. So that you came back about what time? 8:30? A. Yes.

Q. Was Morris Malinsky there at that store when you came back? A. I don't remember seeing him.

Mr. Solovei: I move to strike the answer out.

The Court: Now, as to that particular

point, I am going to sustain the objection, Mr. District Attorney; because I want to be more certain that the date is definitely fixed. Otherwise the time when Malinsky was there or was not there would be of absolutely no importance in the case.

Q. I think you told us a minute ago he did not return to the store that night until closing time? A. I don't remember seeing him.

Q. Did you tell us he did not come back that night? A. Yes.

Q. With that in mind, can you tell us whether—

Mr. Solovei: I move to strike the answer out.

The Court: Strike it out. You say "that night". He has not yet fixed with definiteness and certainty that that was February 15th.

Mr. McGough: I am leading up to it.

The Court: First prove the time and then I will let you prove the other, if it is proper.

By Mr. McGough:

Q. You say this incident about taking the package out of the hall, that happened on Saturday in the middle of February; is that right? A. Yes, sir.

Q. Can you give us the date, if you know, 1941? A. No, sir.

Q. Are you sure and certain it was a Saturday? A. Yes.

Q. You did not work there on other nights you told us? A. No, sir.

Q. This incident about going to supper and not seeing Moish again, was that the very same day? A. Yes.

Q. Was there any other Saturday in that particular month of February, 1941, that Malinsky left and did not come back again that night? A. Not that I remember, sir.

Q. Do you remember distinctly that on that day when you took the package out of the hall 3158 and put it in the toilet, that he was out and did not come back?

Mr. Solovei: Object to that.

Q. Do you understand me? A. I did not get that.

Mr. Solovei: I made an objection.
(Question read).

A. Yes, sir.

3159

The Court: Sustained.

Mr. Solovei: Wait a minute. Your Honor ruled on my objection?

The Court: Sustained. Strike it out. Strike the answer out. As far as showing what you are attempting to show now about absence from the store, you will have to make that absolutely definite that it was on the night in question that we are interested in. Otherwise I will strike out the answer.

Mr. McGough: Has the clerk a 1941 calendar?

The Clerk: I will get one.

By Mr. McGough:

Q. If you saw a calendar for that year, could you fix the date on that Saturday in February, 1941? A. Sir, it was approximately, I would say,—I know that about two weeks of school was over with, because the excitement of the new term was gone.

Q. You mean the new term had already been two weeks under way? A. Yes.

Q. I ask you, if you saw a calendar for that particular year, would that fix the date of the month, the date as to which Saturday it was? A. Yes.

The Court: Show him the calendar.

The Clerk: I have just received one.

(Calendar handed to the District Attorney).

Mr. McGough: Hand him this, please.

(Calendar handed to the witness).

By Mr. McGough:

Q. This is a 1941 calendar. Please will you look at it for the month of February? A. (Witness examines calendar).

Q. Looking at that calendar, can you tell us the date that you say this Saturday in the middle of February, what date it was? A. Yes; it would be the 15th.

Q. After you looked at the calendar your recollection is refreshed as to the exact date; is that right? A. Yes, sir.

Q. You now say it is what? A. The 15th.

Q. All right. Now, on that day, the 15th of February, 1941, you tell us Malinsky went to supper and by the time you went out he did not come back and when you returned from your supper he was not there; is that right? A. Yes.

Q. Now, I ask you, at any time before you closed that night did Malinsky come back? A. 3164
No, sir.

Q. Did you at any time after you came back from supper leave the shop for any purpose at all? A. No.

Q. So that you were there from the return of supper until closing time that night? A. Yes.

The Court: Let us get the times, please, the hours.

By Mr. McGough:

Q. What time did the shop close and you left 3165
the store that night? A. About ten o'clock.

Q. So that between approximately 8:30 p.m. and 10:00 p.m. while you were there, Malinsky did not return? A. No, sir.

Q. You left the store at 10:00 p.m.? A. Approximately.

Q. You went home? A. Yes, sir.

Q. In other words, from the time that he went out to supper, at approximately 7:30, until closing time, you did not see him, whether he came in while you were out to supper, or not; is that right? A. Approximately seven o'clock.

Q. While you were out to supper you don't know whether he came back or not? A. No, sir.

Q. But while you were there and he was out to supper, and up to closing time, you did not see him? A. No, sir.

Cross-examination by Mr. Solovei:

Q. You testified here the other day, didn't you? A. Yes, sir.

3167 Q. Do you remember what you said the other day about this incident of being at Rauch's store? A. Yes.

Q. Do you remember your testimony? A. Yes, sir.

Q. The District Attorney gave you a calendar of 1941, a calendar, didn't he? A. Yes.

Q. You looked at the calendar; is that right? A. Yes.

Q. When you looked at the calendar you saw Saturday was February 15th, didn't you? A. Yes, sir.

3168 Q. Didn't you know Saturday was February 15th without looking at that 1941 calendar? A. Yes, sir.

Q. Did that calendar refresh your memory at all? A. It refreshed it as far as my testimony went; yes.

Q. You just wanted to satisfy yourself by looking at the calendar to make sure that Saturday was February 15th, is that right? A. Yes, sir.

Q. So that if there was any doubt in your mind before you looked at the calendar, the cal-

endar removed that doubt, and now you know it was February 15th; is that correct? A. Yes, sir.

Q. You remember testifying here the other day that you said that it was the beginning of the month of February; do you remember saying that, yes or no?

The Court: Just answer the question in your own way.

Mr. Solovei: No; one moment. I ask the question: Do you remember saying 3170
that, yes or no? I ask for a yes or no answer, your Honor.

By the Court:

Q. Did you say that? A. I said that.

Q. But— A. But I slipped—I made a mistake—I wanted to say "the beginning of the term".

Mr. Solovei: I object.

The Court: Objection overruled.

Mr. Solovei: I except, and ask your 3171
Honor to permit me to examine this witness for the time being.

The Court: You may.

By Mr. Solovei:

Q. You remember this question being put to you by the Court on June 17th—do you remember this question Judge Leibowitz asked you? Listen to it: "Q. By the Court: Q. When was it? The beginning of the month or the end of

the month or the middle of the month?" You remember that question being put to you by Judge Leibowitz? A. Yes, sir.

Q. And see if you remember making this answer: "It must have been about the beginning of the month, because I remember the school term had just begun." Do you remember making that answer? A. Yes, sir.

Q. When you made that answer to that question was it true? A. Yes, sir. (Turns to the
3173 Court).

The Court: The witness turns to the Court and says "May I make an explanation?" You may.

Mr. Solovei: I object to any explanation at this time.

The Court: Overruled.

Mr. Solovei: Exception.

A. By "the beginning of the term" I meant the first quarter of the term. The first quarter is
3174 always called the beginning of the term. And when the Judge asked me the month I was thinking of the term.

By Mr. Solovei:

Q. When was it that you since refreshed your memory as to the term and the beginning and the middle and the end of the term? When did this all come to you? A. I was reminded outside what I had said.

Q. Who reminded you of these things? A. May I answer?

The Court: Yes.

A. The deputy that was with me.

Q. The deputy who? A. I had a deputy with me that day.

Q. What do you mean deputy? Who is this deputy? What is he? Sheriff or cop? A. I just don't know exactly who he was.

Q. You mean you were in custody? A. Yes, sir.

Q. Have you been in the House of Detention? 3176
A. No, sir.

Q. Have you been at a hotel? A. No, sir.

Q. You have been in custody? In whose custody, were you? A. The custody of the civil prison.

Q. And you have been kept at the City Prison as a witness, have you? A. Yes, sir.

Q. As a material witness? A. Yes.

Q. When were you put there? A. It was June the 11th.

Q. Did it take you so long to find out when you were put there? Did it? Why did it take 3177
you so long to find out when you were placed in the Civil Prison? This only happened on June 11th, 1943.

Mr. McGough: Objection, may it please the Court.

The Court: Sustained.

By Mr. Solovei:

Q. You were placed, you say, on June 11, 1943, in the Civil Prison at the City Prison here at the Raymond Street Jail? A. Yes, sir.

3178 *Peter Shamin—Rebuttal for People—Cross*

By the Court:

Q. You were committed there by order of the Court, weren't you? A. Yes.

Q. As a material witness? A. Yes, sir.

Mr. Solovei: May I ask the District Attorney at this time to produce the affidavit upon which the order of the Court was made to commit this man to
3179 the City Prison?

Mr. McGough: I haven't got it.

The Court: It is a matter of court record.

Mr. McGough: The original is downstairs. I haven't got a copy.

The Court: The clerk will produce it. Proceed while we are waiting.

By Mr. Solovei:

Q. Before you were placed in the City Prison, on June 11th, 1943, who interviewed you? A.
3180 Assistant District Attorney Mr. McGough.

Q. You were notified before that, by somebody, weren't you? A. No.

Q. Didn't you have some detectives come to see you and have a talk with you? A. No, sir.

Q. Weren't there some detectives that came to see you at Rauch's store? A. No, sir.

Q. At no time? A. No, sir.

Q. Were you taken from Rauch's store some place to be examined? A. No, sir.

Q. When was the first time you spoke to anybody about this case? A. It was in April.

Q. April of what year? A. This year.

Q. Where was it you spoke to this person, and who was he? A. Assistant District Attorney McGough.

Q. Who brought you to McGough's office? A. McGough had sent me a letter inviting me over.

Q. Where were you living at the time? A. At my same address.

Q. And in April of 1943 is the first time you saw Mr. McGough? A. Yes, sir.

Q. And spoke to any of the police officers in 3182
this case? A. (Witness turns to the Court and whispers.)

The Court: Repeat what you just said to me.

A. I don't know who the police officers in this case are.

Q. Did you ever talk to police officers or persons who showed you a shield and told you that they were police officers, detectives? A. Yes, sir.

Q. When was that? A. That was in Mr. Mc- 3183
Gough's office.

Q. I am talking about before that? A. Never before that.

Q. Who were the police officers you spoke to in Mr. McGough's office? A. I don't know them by name.

Q. You don't know them by name, do you, is that right? A. Yes.

Q. Do you know their names now? Have you since found out their names? A. Yes.

Q. What is the name? A. I know the first name, I don't know the second.

3184

Q. What is the first name? A. There was George, there was Steve.

Q. Steve?— Yes. A. And Charlie.

Q. Would you remember their last names if I told them to you? Was it Steve Brady, Detective Steve Brady? A. I don't remember him.

Q. Was it Detective George Low? A. Yes, sir.

Q. Detective Charlie Gordon or Jordan, was it, or Celano?

3185

Mr. McGough: I object to this. I don't know what purpose he has.

The Court: Mr. Solovei must have some purpose in mind. He may proceed.

By Mr. Solovei:

Q. Was it Detective Celano? A. Yes, sir.

Q. How many times did you see them in the District Attorney's office? A. Twice.

Q. How many times were you in the District Attorney's office? A. I was there three times.

3186

Q. You know what day in April you were there, what day of the week? A. It was on a Monday.

Q. You know what day of the month it was? A. No, sir.

Q. Cannot give us any idea of the day of the month it was that you were there in April of this year? A. It was the beginning of the month.

Q. Was it the 5th of the month? A. I don't remember the date.

Q. Would you say it was from the 5th to the 10th of April, 1943? A. I would not say.

Q. If you looked at the calendar would it help you to refresh your memory? A. Yes, sir.

Q. Look at a calendar of April, 1943, see if you can refresh your memory as to when you were there. (Calendar handed to witness) A. It was on the 4th.

Q. April 4th? A. Yes.

Q. Were you there in the morning or in the afternoon, do you know? A. Evening. 3188

Q. Evening? A. Yes.

Q. What time would you say you got there? A. About 7:30.

Q. Were you working that day? A. Yes, sir.

Q. Whom did you work for? A. For a defense plant.

Q. Where did you work? A. In Hoboken.

Q. What is the name of the plant? A. L. O. Koven & Bro.

Q. Do you know the address in Hoboken? A. No, sir.

Q. How long have you been working there? 3189 A. The past six months.

Q. Were you working there when you were placed in the Civil Prison? A. Yes, sir.

Q. Now, when you were there on April 4th, 1943, about 7 p.m., you were examined by police officers, and you were also examined by Mr. McGough, is that right? A. No, sir.

Q. You were examined by Mr. McGough, were you? A. Yes.

Q. He asked you questions and you made answers, is that right? A. Yes.

Q. There was a stenographer there? A. No.

3190

Q. No stenographer there? A. No.

Q. Did you sign a statement? A. No, sir.

Q. Did you make out a statement in your own handwriting? A. No, sir.

Q. Did he question you while somebody was taking down stenographically what you were saying? A. No, sir.

Q. Up to the present time you received $21 for being in jail? A. Yes, sir.

Q. Is that all the money you received? A.

3191 Yes, sir.

Q. Promised any more money? A. No, sir.

Q. Now, you said something about somebody in Mr. McGough's office that reminded you or called your attention about the term of the school; is that right? A. Where? No, sir.

Q. Wasn't there some talk in the District Attorney's office when you were there on April 4th, 1943, about the term of the school? A. No, sir.

Q. While you were in the District Attorney's office on April 4th, 1943, you knew that what

3192 you testified to here occurred some time in February of 1941, but you were not sure as to the date; is that right? A. Yes, sir.

Q. And that is what you told Mr. McGough, isn't that right? A. (Witness turns to the Court.)

The Court: "I don't follow that", he said.

By Mr. Solovei:

Q. See if you follow me. You told Mr. McGough when he asked you what occurred in

Rauch's store in February of 1941, you told him you were not sure as to the date, is that correct? A. Yes.

Q. When you told him that you meant just exactly what you said, isn't that right? A. Yes, sir.

Q. Now, since then—look at me, please—since then somebody refreshed your memory, is that right? A. Yes, sir.

Q. Who was that person who refreshed your memory as to when this is alleged to have occurred in Rauch's store that you testified here? 3194
A. (Witness turns to the Court).

Mr. Morritt: Object to the witness speaking to the Court. I object. I think your Honor should tell this witness he should address his remarks to the jury, and not as he has done, three or four times speaks sotto voce to the Court.

The Court: So instructed.

By Mr. Solovei:

Q. Please answer the question. A. Assistant 3195
District Attorney McGough helped me establish the date, the time.

Q. He helped you by first telling you when the Fox—an officer by the name of Fox was killed in Coney Island; isn't that right? A. No, sir.

Q. He called your attention to that date, didn't he? A. No; not until after I established the time.

Q. You did not establish—look at me—don't look over there—look at me for a minute—

The Court: He is looking at you.

Mr. Solovei: Now, he is; yes.

The Court: Been looking at you all the time. Go ahead.

Mr. Solovei: I am sorry, Judge.

The Court: Go right on, please, with your examination.

By Mr. Solovei:

Q. When you say he helped you fix the time, you say that he helped you fix the time—what did he do for you? A. He asked me, "Was it before Christmas, after Christmas? Do you remember any incident that happened that would bring you up to that time?"

Q. You did not place any special incident that happened that would bring you up to the time of February 15th, as you testified here today, did you?

Mr. McGough: Objection.

The Court: Overruled. Do you understand the question?

The Witness: No.

Mr. Solovei: Will the stenographer, please read the question, Judge.

(Question read.)

A. Yes; I did.

Q. Today? A. Yes.

Q. You told us about a special incident? A. Yes; I said it was about two weeks after the beginning of the school term.

Q. You remember, on the 17th of June, you

told us, "About the beginning of the month"? A. I meant to say, "The beginning of the school term."

Q. When did school begin in 1941? A. Approximately the third.

Q. School began on February 3rd, 1941? A. Yes.

Q. And you said it was the beginning of the school term; is that right? A. (To the Court) I don't understand the question.

Q. Won't you please answer my question? 3200
You didn't have to turn to the Court to answer the District Attorney's question.

Mr. McGough: I object to counsel lecturing the witness.

Mr. Solovei: I am not lecturing him, I am asking him a question.

Mr. McGough: I object to any comments not in the form of questions.

The Court: Put the question again.

Q. You did not have to turn to the Judge and say something to the Judge when the District Attorney's asked you questions, whenever you answered his questions, did you? 3201

Mr. McGough: Objection. It serves no purpose. It is argumentative, to say the least.

By the Court:

Q. Did you turn to the Judge when the District Attorney asked you any questions? A. No, sir.

By Mr. Solovei:

Q. You answered him without any help from anybody, didn't you? A. When he asked me a question he asked me a simple question.

Q. You mean the questions are kind of complicated? A. I don't understand you.

Q. If you don't understand, please tell me that you don't understand? A. Yes.

Q. You said that the term begins on February 3, 1941; is that correct; the term of school, is that right? A. One term should end about January 31st. You get your new term and everything in January, and February you go to your new classes.

Q. When did you commence your new classes in February? Or particularly, when did you commence your new classes in February of 1941? Do you understand my question now? Is that plain? A. Approximately the 3rd.

Q. So that you told the Judge, on the 17th of June, while you were a witness here, that this alleged occurrence that you are talking about here happened at the beginning of the school term; is that correct? A. That is, the beginning of the school term is the first quarter.

Q. The beginning of the school term is the first quarter? A. Yes, sir.

Q. When you say quarter, what do you mean? How many? What? A month or two or three? What do you mean by quarter? A. A quarter would be approximately five weeks.

Q. So that the beginning of the school term, you mean, would be the first quarter? A. Yes, sir.

Q. The first five weeks? A. Yes, sir.

Q. So that this happened within the first five weeks, is that right? A. Yes, sir.

Q. It could have happened on Saturday within the first five weeks, is that right? A. No, sir.

Q. It happened within the first quarter, didn't it? A. Yes, sir.

Q. And who called it to your attention that the first quarter was within the first five weeks? The District Attorney? A. No, sir.

Q. What was it that he helped you out in that 3206
refreshed your memory when you were there on April 4, 1943? A. He asked me how long it was that the term was on about that time.

Q. What did you say? A. I thought it over; I started thinking back—

Q. What did you tell him? A. I told him it could have been anywhere in the middle of the month.

Q. Could have been anywhere in the middle of the month? Is that what you told him? A. Yes, sir.

Q. And you were not sure as to any specific 3207
date of the month, and you could not give him any specific date of the month; is that right? A. Yes, sir.

Q. And when you told him that was it true? A. Yes.

Q. Is it just as true today as it was the day you told it to him? A. Yes, sir.

By the Court:

Q. It was on a Saturday and if I understand you only worked on Saturday? A. Yes, sir.

3208 *Peter Shamin—Rebuttal for People—Cross*

By Mr. Solovei:

Q. You worked there the entire month of February, 1943? A. Yes.

The Court: He said he only worked on Saturday.

Mr. Solovei: Yes; on Saturdays. I am talking about that.

3209 By Mr. Solovei:

Q. I mean every Saturday in the month of February, 1941—when I said 1943 I did not mean that—you worked there every Saturday in February, 1941; is that right? A. Yes, sir.

Q. Did you work there in January of 1941 on Saturday? A. Yes, sir.

Q. Did you work there in March of 1941 on Saturdays? A. Yes, sir.

Q. And this man Charles Celano, Detective Charles Celano, this fat man—you have seen him? A. Yes.

3210 Q. You have been in the District Attorney's room here in the front part of the building during the course of this trial, haven't you? A. Yes, sir.

Q. You have sat there with Yellin and Spielfogel and Kovner? A. (Turning to the Court) I don't know just who these people are.

The Court: Answer his questions.

A. I don't know just who these people are.

Q. Did you see those men sitting in the front room of the District Attorney's office over here?

Mr. McGough: Objection. He says he does not know who they are.

By the Court:

Q. Did you see a man sitting there? A. Yes.

Mr. Solovei: I ask that they be called in for identification.

The Court: All right; bring them in. Whom do you want, Mr. Solovei?

3212

Mr. Solovei: Kovner, Spielfogel and Yellin.

The Court: Bring them in one at a time.

Mr. Solovei: I will continue in the interim.

The Court: Yes.

By Mr. Solovei:

Q. This Charles Celano, this fat police officer, this detective, that spoke to you, you have seen him here, haven't you? A. Yes.

3213

Mr. McGough: Object to the description, please.

The Court: Overruled.

By Mr. Solovei:

Q. Did you ever speak to him about this case, in your life?

(Spielfogel brought in.) See that man? A. Yes.

Mr. Solovei: Indicating Spielfogel for the record.

(Spielfogel taken out again.)

The Court: Bring the next one in.

By Mr. Solovei:

Q. This man that you just saw, that you identified as Spielfogel—

The Court: He did not identify him as Spielfogel.

By Mr. Solovei:

Q. I mean you saw that man, didn't you? A. Yes.

Q. You have seen that man before, haven't you? A. Yes.

Q. Why did you say you did not know him?

Mr. McGough: Objection.

A. I don't know him under the name of Spielfogel. I know him under the name of Slip.

By Mr. Solovei:

Q. I ask you if you saw anybody in that room that you recognized or that you knew and you said, you did not know anybody sitting there.

Mr. McGough: I object to that. He asked him "Did you see" a whole list of names, and he added the name Kovner on it, and the witness said, "I don't know

this man". Now he is trying to put a false interpretation or a false version on his own question.

Mr Solovei: I object to any statement made by the District Attorney which is not a legal objection. An objection should be made in legal form, without making any statements or comments in the presence of the witness or this jury; and I object to this kind of objections, your Honor; it is highly improper and prejudicial to the rights of the defendant. 3218

The Court: All right now, gentlemen; it is a very torrid day, and everybody is uncomfortable I know, tempers are strained, nerves are on edge. We have been at this for many days. Let us keep cool and calm, and proceed, despite the trying circumstances. There, another man has been brought in.

By Mr. Solovei:

Q. See this man there? A. Yes. 3219

Mr. Solovei: Indicating for the record David Yellin.

A. Yes.

By Mr. Solovei:

Q. When is the first time you ever saw him?
A. I seen him in the building.
Q. When? A. During the trial.

Q. Seen him here all last week? A. (Turning to the Court).

Q. Look at me. Never mind the Judge. Answer my question.

Mr. McGough: Object to this entire line of questioning unless its materiality is shown. This is just a little act.

Mr. Solovei: I object again. This is not an act. I am going to attack this man's credibility. I object to any statement that this is an act. That is highly improper and should not be done in the presence of a jury where a man's life is at stake.

Mr. McGough: I will withdraw the objection; but this business of bringing them in and bringing them in; I think I am tired of sitting here just as well as your Honor is. If there is a purpose to it, all right; I will withdraw the objection. I object to my opponent here shouting. I can hear him perfectly. He is only three feet from me.

Mr. Solovei: I ask for the withdrawal of a juror and the declaration of a mistrial.

The Court: No, no; motion denied.

Mr. Solovei: Exception.

The Court: I will tell you what we are going to do: We are going out for some lunch now.

Mr. Solovei: Your Honor is going to eat lunch? I ask your Honor to keep

this man from talking to any witness or any police officer.

The Court: You don't object to my sending the jury out to lunch, do you? Maybe if you had a little lunch yourself and the District Attorney has a little lunch himself, we will all be nice and cool when we come back. The only cool man now is the Judge.

Mr. Morritt: I would like the record to show that the hour is only 12:20. 3224

The Court: Sit down, please.

Mr. Morritt: I make a motion.

The Court: I will rule on your motion if you will please sit down. (To the jury) Now, gentlemen of the jury, we are about to take a recess for luncheon. Please don't discuss the case among yourselves or with any other person or permit anyone to speak to you about this case, or discuss it in your presence. You must keep your minds, open. Don't form or express any opinion or conclusion as 3225 to the guilt or innocence of the defendants on trial or any of them or either of them, until the case is finally submitted to you for your consideration after a charge by the Court. You may retire now and return at half past one. If counsel desires that the Court put on the record when the adjournment for luncheon is taken, the Court will note it is about twenty-five minutes past twelve.

Mr. Solovei: I am not interested in that. My application is to have your

Honor, instruct this witness not to talk to anybody about this case.

The Court: I will take care of that.

Mr. Solovei: That is all I ask.

(The jury retired from the room).

The Court: Young man, you are not to talk to a soul between now and the time you go back on the stand; not even to say good morning or good night—nothing—you understand that—not even "boo" to anybody.

Mr. McGough: May I suggest your Honor tell him to go off and have his lunch by himself?

The Court: He can have his lunch. He should not say a word to anybody over there, except, maybe, to the waitress.

(Recess until 1:30 p. m.)

AFTERNOON SESSION TRIAL RESUMED. 1:30 P. M.

PETER SHAMIN, resumes the stand:

Cross-examination by Mr. Solovei Continued:

Q. Now, the last man you identified as being in this room in the front part of this building, was one David Yellin; you remember that? A. Yes, sir.

Q. Did you know him before? A. No, sir.

Q. Did you ever see him around the East Side? A. No, sir.

Q. Did you know the other man who was sitting in the room there, Kovner? A. No, sir.

Q. You saw a third man there in the room where you were, where Yellin and Spielfogel were? A. Yes; I seen a third man.

Q. Saw him there all last week and yesterday and today; is that correct? A. No, sir.

Q. See him last week? A. Yes, sir.

Q. All last week? A. No, sir; I was not here all last week.

Q. What days did you spend in this building last week? A. From Wednesday on. 3230

Q. From Wednesday up to today, did you see that man? A. You asked me if I seen a man there.

Q. I am talking about the third man. Maybe we had better identify him.

Mr. Solovei: May we have Kovner brought in, please?

The Court: Yes; bring in Kovner.

Mr. Solovei: While we are waiting for Kovner to come in I will proceed. 3231

By Mr. Solovei:

Q. When did your term commence in 1943?

Mr. McGough: Object to that as already been asked before.

Mr. Solovei: I never asked about 1943.

By the Court:

Q. Do you go to school now, this year? A. No, sir.

3232 *Peter Shamin—Rebuttal for People—Cross*

By Mr. Solovei:

Q. You don't go to school now? A. No, sir.

Q. Did you go to school in 1942? A. Half a year.

Q. What half a year did you go to school? A. I went from January to June.

Q. When did your term commence in 1942?

Mr. McGough: Objection.

3233 The Court: Overruled.

A. In June.

By Mr. Solovei:

Q. Your term commenced in June? A. Yes, sir.

Q. When did the term commence before June? A. You mean the term before?

Q. Yes. A. In January.

Q. What day in January did the term commence? A. I don't remember.

3234 Q. You don't remember? Can't you give this jury any idea of what day in the month of January of 1942 the term commenced in the school that you went to?

The Court: First, what school is it?

Mr. Solovei: All right, we will get that, Judge.

By Mr. Solovei:

Q. What school did you go to? A. The High School of Commerce.

Q. Where is that High School of Commerce? A. On 65th Street.

Q. 65th Street? A. And Amsterdam Avenue.

The Court: Here is Kovner.

Q. You see that man standing up against the wall with the blue shirt? A. Yes.

Q. When is the first time you ever saw him? A. Thursday.

3236

Mr. Solovei: Indicating for the record Sam Kovner.

Q. You have seen him there Thursday, Friday and Saturday? A. I seen him there Thursday. I think I seen him there Friday.

Q. You think you saw him there Friday? A. I seen him there Friday.

Q. What? A. I seen him there Friday.

The Court: All right; take him out.
(Kovner taken out).

3237

By Mr. Solovei:

Q. You are not scared of anybody here, are you? A. No, sir.

Q. You don't think anything is going to happen to you, do you?

Mr. McGough: Objection.
The Court: Overruled.

By Mr. Solovei:

Q. Do you, Shamin? A. No, sir.

Q. How old are you now? A. Eighteen and a half.

Q. You have always lived home with your family, haven't you? A. Yes.

Q. And you have never been in any trouble? A. No, sir.

Q. And you always went to school, didn't you? A. Yes, sir.

Q. Now, did you see this man Kovner in this building on Wednesday of last week? A. No, sir.

Q. Did you see him on Thursday of last week? A. Yes, sir.

Q. Did you see him on Friday of last week? A. Yes.

Q. Did you see him on Saturday? A. No, sir.

Q. Were you here Saturday? A. Yes.

Q. Were you in that room on Saturday, the same room that you have been kept in all the time? A. Yes.

Q. Did you see Slip and Yellin there? A. Yes.

Q. But you did not see Kovner there, is that it? A. I seen him there.

Q. Saturday? A. I seen him there Thursday and Friday.

Q. I am asking about Saturday? A. No, sir.

Q. Did you see him Monday? A. No, sir.

Q. Monday of this week I mean? A. No, sir.

Q. But you did see Yellin and Slip there on Monday of this week? A. No, sir.

Q. Did not see him there? A. No, sir.

Q. Were you in the room? A. No, sir.

Q. You were not down? A. No, sir.

Q. You were not here? A. No, sir.

Q. Did you leave the jail on Monday? A. No, sir.

Q. You stayed in the jail all day Monday? A. No, sir.

Q. Were you out on the 17th, discharged? A. Yes, sir.

Q. You are not in jail now? A. No, sir.

Q. So that on the 17th you left the jail, is that it? A. Yes, sir.

Q. That was Friday of last week? A. Yes, sir.

Q. Had you been to the District Attorney's 3242
office on Saturday? A. No, sir.

Q. Have you been there on Monday? A. No, sir.

The Court: Friday was the 18th.

By Mr. Solovei:

Q. Friday was the 18th? A. I was discharged on the 17th.

Q. You were discharged on the 17th? A. Yes, sir.

Q. That was Thursday? A. Yes.

Q. And you were here on Friday, is that it? 3243
A. Yes.

Q. Between Friday and up to the time that you took this stand today, did you talk to the police officers about this case? A. No, sir.

Q. Did you talk to McGough about the case, this gentleman here, Mr. McGough? A. Yes; I only told him that my—what the deputies had told me then, that I said the beginning of the month instead of the beginning of the term, and I told him that and I asked him if I could have a chance to correct it.

Q. You told that to him, to McGough? A. Yes, sir.

Q. You told him what the deputies told you, is that what you said a minute ago? A. I told him that I had made a mistake in court.

Q. Didn't you tell me a minute ago, Mr. Shamin, that you told Mr. McGough what the deputies told you? Didn't you use that language? A. Yes.

Q. Who were those deputies? A. I don't
3245 know them by names.

Q. Can you tell us who they are? When you call them deputies, deputy what? A. Deputy sheriffs.

Q. Deputy Sheriffs? How many of them? A. There were two of them.

Q. You have seen them in court? A. Yes, sir.

Q. You have seen them in that little room there? A. Yes.

Q. Was it the stout fellow I have described to you as Charles Celano? A. No, sir.

Q. Was it Lieutenant McNally? A. No, sir.

3246 Q. Was it Detective George Low? A. No, sir.

The Court: He said "sheriffs" not "detectives".

Q. Who were the sheriffs?

The Court: Don't prolong this unnecessarily.

Mr. Solovei: I am sorry. I am going to ask the questions. I am sorry, your Honor. I assure you I am not prolonging it.

The Court: He said "sheriffs".

Mr. Solovei: I am asking him the questions.

By Mr. Solovei:

Q. Who were the sheriffs? A. I know one name is Al.

Q. Al what? A. I don't know his second name.

Q. Where does he come from? Raymond Street Jail? A. First I saw of them they came for me in Mr. McGough's office, then they took me to court. 3248

Q. Where did they take you? From Mr. McGough's office to where? A. They took me to court here.

Mr. Solovei: I object to this, if your Honor please, that your Honor seems to feel your are disgusted.

The Court: I am not feeling disgusted at all, and don't you put on the record anything that is misleading. I give you fair warning now; don't you dare to put anything on this record—cease! 3249

Mr. Solovei: I am not putting anything on; I am examining this witness.

The Court: Cease your talk.

Mr. Solovei: I object to your Honor's shouting at me.

The Court: Please cease that, counsel, and act respectfully to the Court; and don't you dare put anything on that record that is misleading.

Mr. Solovei: I am not putting anything on the record and I object to your Honor talking to me in that manner and I take exception.

The Court: Proceed with the witness.

Mr. Solovei: I am going to proceed.

The Court: I warn you not to dare put anything that is misleading on this record.

Mr. Solovei: That is not misleading. I am making a statement to your Honor that I take exception to your Honor's statement to me.

By Mr. Solovei:

Q. Who is this man Al?

Mr. McGough: Objection.

The Court: Sustained.

Mr. Solovei: I take an exception.

By Mr. Solovei:

Q. Is this man Al the man that took you from Mr. McGough's office to Raymond Street Jail?

Mr. McGough: Objection, please.

The Court: Overruled.

A. No, sir.

By Mr. Solovei:

Q. You call him a deputy, will you please tell me was he in uniform? A. No, sir.

Q. Did you see a badge on him? Did he show you a badge? A. No, sir.

Q. Did you see those two men that you say you call deputies, did you see them in the court-room? A. Yes; they were standing right here.

Q. You mean in this court while you were testifying? A. Yes, sir.

Q. Do you mean that they are deputies, people connected with this court?

Mr. McGough: Objection.

The Court: Overruled.

Mr. Solovei: I am trying to find out 3254
who they are.

The Court: Proceed.

By Mr. Solovei:

Q. Will you tell us who they are?

Mr. McGough: Objection.

The Court: Overruled.

A. In my own way?

By Mr. Solovei: 3255

Q. In your own way. A. That is all I know: They came for me over in Mr. McGough's office. They were told to take me to court and they did so.

Q. Were they in this court-room while you were testifying? A. Yes, sir.

Q. Were they men that you say that carried a badge, like that gentleman seated in the corner there, connected with the County Court? A. I did not ask them for their badge.

Q. In any event, whoever those two persons

were, those are the two persons that corrected you and told you that you were mistaken, is that right; am I right or wrong?

A. (Turns to the Court).

The Court: You may answer it in your own way.

A. When I left this court-room they told me what I said, that it was the month; then I started thinking of the month, the term.

Q. Did they tell you you were mistaken? A. No.

Q. Can you give us the exact language that they used to you as near as you can? A. I cannot give the exact language.

Q. Can you give us the substance of the conversation without giving us the exact language? A. Yes.

Q. Just tell us what they said to you, please, as nearly as you can? A. We were going back to the Raymond Street Jail. I asked them if they thought that I would be needed any more, and one, this Al, said, "Maybe; maybe not. If they find they have to bring you back, they will." And he told me what had happened.

Q. Tell us what he said? A. He told me that my testimony was brought down because no definite time was stated.

Q. He told you that? A. Yes.

Q. What else did he say? A. Nothing else.

Q. Nothing else? A. No.

Q. What did you say? A. I did not say anything.

Q. Did he tell you how you could correct it? A. No.

Q. Did he tell you in what way it was wrong other than what you just said? A. No, sir.

Q. Then after that you went back to the District Attorney's office and you were told that you were mistaken, is that it? A. No, sir; I did not go back to the District Attorney's office; I came back here.

Q. You came back to this building? A. Yes.

Q. You spoke to the District Attorney in the front part of this building, in a room occupied by the District Attorney; is that correct? A. 3260
Yes.

Q. And you had a conversation with him in that respect? A. No; not a conversation; a few words passed, and that is all.

Q. He asked you some questions? A. No.

Q. He did not ask you anything? A. No, sir.

Q. You just sat there? A. He told me that he would try to get me back on the stand.

Q. Did he ask you any questions as to whether or not you were mistaken about the date? A. I did not follow that.

Q. Did he ask you whether or not you were 3261
mistaken about the date when you testified on the previous occasion? A. He left that up to my own judgment.

Q. Tell us what he said about it, will you? A. he said—well, I remember he came in, he was in a hurry—"At the beginning of the month; I thought you said the middle of the month." He just came in fast. He said, "You know, the beginning of the month; I thought you said the middle of the month." Then I started telling him that I had made a slip in court.

3262 Q. You told him you made a slip in the court? A. I gave a wrong answer.

Q. Then did he ask you whether or not you could specifically remember the exact date of the month it was; did he ask you that? A. No, sir.

Q. He did not ask you that in this building here yesterday? A. No, sir.

Q. The only thing you told him, you gave a wrong answer; but you did not tell him you knew the exact date, is that it? A. No, sir.

3263 Q. Now this High School of Commerce at 65th Street and Amsterdam Avenue, you said you went to in 1942 for half a term; is that correct? A. Yes, sir.

Q. And you said that the term, first term of that year, 1942, commenced in January, 1942; is that correct?

Mr. McGough: Objection.
The Court: Sustained.
The Witness: Repeat that again.
The Court: No objection sustained.
Mr. Solovei: I except.

3264

By Mr. Solovei:

Q. While you were going to the High School of Commerce in 1942, the term did not commence in February, 1942, did it?

Mr. McGough: Objection.
The Court: Sustained.
Mr. Solovei: Exception.

By Mr. Solovei:

Q. Do you now say that the term of the Am-

sterdam High School which you attended in 1942 did not commence in February, 1942?

Mr. McGough: Objection.
The Court: Sustained.
Mr. Solovei: Exception.

By Mr. Solovei:

Q. On this Saturday that you were talking about when you were in Rauch's store, did you see Malinsky there all day? A. Did I see him there all day? 3266

Q. Yes. A. No, sir.

Q. What hours did you see him there? A. I seen him there up until I went to lunch.

Q. Wait a minute. Let us get that. You went to lunch at what hour? A. About one o'clock.

Q. You saw Malinsky then? A. Yes.

Q. You came back from lunch? A. Yes.

Q. What time did you come back? A. About 45 minutes.

Q. What time? A. 1:45.

Q. When you came back from lunch did you see Malinsky then? A. Yes. 3267

Q. Did you remain in the store all afternoon? A. Yes.

Q. Did you see him in the store all afternoon? A. Correction, please. I was not in the store; I was in the street.

Q. In the street? A. Yes.

Q. What did you want? A. We had a stand out there and I took care of the stand.

Q. In front of the store? A. Yes, sir.

Q. While you were there working on the stand did you go in and out of the store? A. Yes.

Q. Did you see Malinsky there? A. Yes.

Q. What time did the outside stand close that day? A. Ten o'clock.

Q. At night? A. Yes, sir.

Q. And were you there from 1:45 until 10 p.m.? A. I went out for supper.

Q. What time did you go out for supper? A. About 7:45.

Q. From 1:45 p. m. until 7 o'clock, the time that you went out for supper, did you see Malinsky in or about the premises of Rauch's store? A. Excuse me. I went to supper, it was about 7:45.

Q. I stand corrected. 7:45. So from 1:45 p. m. to say 7:45, when you went out for supper, did you see Malinsky around Rauch's store during those hours? A. I seen him leave the store.

Q. What time? A. About seven o'clock.

Q. From 1:45 until seven o'clock did you see Malinsky around that store? A. Yes.

Q. Was he in the store? A. Yes.

Q. Did he at times come out to the stand? A. Yes.

Q. You spoke to him? A. Yes.

Q. And he spoke to you? A. Yes, sir.

Q. So that from 1:45 until seven o'clock that evening you never lost sight of Malinsky all the time while you and he were at this store; is that correct? A. Never lost sight of him?

Q. Yes; I mean other than seeing him go in and out of the store and he was around the store? A. Place him in the store.

Q. All right; you place him in the store? A. No; you are asking me to place him in the store.

Q. Put him anywheres you want, Mr. Witness. Now, you tell this Court and jury whether or not Malinsky from 1:45 until 7 p. m. that day ever left Rauch's store? A. He came out to me about four o'clock. I don't know if he left or anything like that before four.

Q. Well, what I want to get from you, Mr. Witness: You told us a little while ago that you saw Malinsky from 1:45 until 7 p. m., didn't 3272
you? Didn't you say that? A. Excuse me. Do you mean did I look straight at him from 1:45 to 7 p. m.?

Q. No; I don't mean did you look straight at him. Did you see him around the store? A. I am telling you when I seen him. I seen him about four o'clock.

Q. Did you see him at five o'clock in there? A. I did not look for him.

Q. Did you see him at six o'clock? A. No, sir.

Q. Did you see him around the premises between four and seven o'clock? A. (Looks to- 3273
wards the Court) Pardon me. I am outside in the street. I am facing the people on the sidewalk. My concern is the stand; his concern is the store.

Q. You did walk in the store from time to time, didn't you? A. Yes.

Q. When you walked in the store from time to time did you see Malinsky there? A. I don't remember seeing him there.

Q. Do you remember whether or not you saw him between the hour of five and six p. m. on that day in the store? A. No.

Q. Can't remember that? A. No, sir.

Q. Is there any reason why you can't remember that?

Mr. McGough: He did not say that. I object to it. The answer was "No."

The Court: Sustained.

By Mr. Solovei:

3275 Q. Did anybody ever call your attention to anything that happened between those hours that makes you forget about that? A. No, sir.

Q. Did you see him at seven o'clock? A. Yes, sir; approximately seven.

Q. Did you see him before seven, between six and seven? A. I don't remember of seeing him.

Q. When was it that you saw him on the day that you spoke about, that you say he told you to go in the hall? What time was that? A. That was about four o'clock.

Q. Four o'clock in the afternoon? A. Yes, sir.

3276 Q. And you went to the hall and you got some package out, you say? A. Yes.

Q. You felt some hard instrument in the package, you say? A. Yes, sir.

Q. Who told you to say you felt something hard, that felt to you like—I don't know—I think you said something about the butt of a gun, I think you said, didn't you? A. Yes, sir.

Q. Is that what you said? A. Yes, sir.

Q. Did anybody ask you about that? A. No, sir.

Q. Did anybody ask you about that? A. No, sir.

Q. Did you ever tell anybody about that before? A. No, sir.

Q. Now, did you ever talk to Detective Charles Celano about this case? A. Yes, sir.

Q. Did you tell him what you knew? A. No, sir.

Q. Never said a word to him at all about it; is that correct? A. He was in the room when I was being questioned, but he did not ask me any questions.

Q. Did you ever tell Detective Celano that 3278
Malinsky sent you for a package; yes or no? A. I talked—there was a few men in the room.

Q. I am asking you—

The Court: No; I am going to let him answer it.

Mr. Solovei: I take an exception.

The Court: You have it.

Mr. Solovei: I ask that that answer be specific as to this part of the answer.

The Court: Your application is denied.

Mr. Solovei: Application is denied? I except. 3279

The Court: Proceed. Answer it in your own way.

A. There were a few in the room. There was Assistant District Attorney McGough, I, that Charlie—Detective Charlie Celano—Detective George Low; I think that is all.

Q. What day was this you say there were a few in the room, that you claim you had some talk? A. It was June 4th.

Q. June 4th? A. Yes, sir.

3280 Q. And after you made that statement, did you go home? A. Yes, sir.

Q. Did you ever have a personal talk with Detective Celano and tell him what you in substance testified to here? A. Yes, sir.

Q. Where did you talk to him? A. I was waiting for Assistant District Attorney McGough to finish with some one else in one room, and Detective Celano and I were sitting in the room chatting.

3281 Q. And what day of the week was that, or what day of the month? A. June 4th.

Q. That was on the same day? A. Yes, sir.

Q. Didn't you a minute ago say that your conversation was had in the District Attorney's office, in McGough's room, where there was several detectives; and that you did not personally talk to Celano? A. I did not personally talk to Celano there; no.

Q. You at no time personally spoke to him, did you? A. Yes.

Q. Was that on the 4th of June? A. Yes, sir.

3282 Q. Did you come to the District Attorney's office on the 5th of June? A. No, sir.

Q. Did you see anybody in reference to this case on the 5th of June? A. No, sir.

Q. See anybody on the 6th of June? A. No, sir.

Q. See anybody on the 7th of June? A. No, sir.

Q. 8th? A. No, sir.

Q. 9th? A. No, sir.

Q. 10th? A. No, sir.

Q. 11th? A. Yes, sir.

Q. So that between the 4th of June, 1943 up

to the 11th of June, 1943, you spoke to nobody about this case; is that right? A. Yes, sir.

Q. Now, did you at any time make a statement to the District Attorney, when you were being examined there, while a stenographer was present, and took down your answers to the questions that were put to you? A. Yes, sir.

Q. What day was that? A. That was in April.

Q. What day in April? A. Can I see that 1941 calendar? (Calendar handed to the witness.) 3284

The Court: I think you have been over that before, haven't you?

Mr. Solovei: I don't think so. It is all new matter to me. I am only just bringing it out.

Mr. McGough: Unless the materiality of this question is made known I am going to object to it.

The Court: Your objection is overruled.

(Witness examines 1943 calendar.) 3285

The Court: You are asking him when he was in Mr. McGough's office.

Mr. Solovei: He said, "Can I have the 1941 calendar?"

By the Court:

Q. Did you mean the 1941 calendar? A. No; I meant 1943.

Mr. Solovei: I gave him what he asked

for. He asked for it and I gave it to him. I did not say anything about it.

A. It was the 6th.

Q. 6th of April you were there? A. Yes, sir.

Q. You said this morning you were there on April 4th? A. 5th, I meant to say. It was on Monday, and I was there the following day, Tuesday.

Q. Were you there on April 4th? A. No, sir.

3287 Q. Did you say this morning that you were there on April 4th? A. Yes.

Q. Were you mistaken about April 4th? A. Yes, sir.

Q. You are now saying you were there on April 5th? A. 5th and 6th.

Q. April 5th and 6th in the District Attorney's office; is that right? A. Yes, sir.

Q. This year? A. Yes, sir.

Q. And on both of those days, did you make a statement to the District Attorney and there was a stenographer present that took your answers to the questions? A. On the 6th.

3288

Mr. Solovei: May I now have the statement, your Honor?

Mr. McGough: May I follow the rule and hand it to your Honor, please. (Handed to the Court.)

The Court: Mark it for identification.

(Marked People's Exhibit G for identification.)

The Court: The Court now turns over

to counsel for the defendant the statement alleged to have been made by this witness to Assistant District Attorney McGough. State the date, please.

Mr. Solovei: March 23rd, 1943. I will have to ask your Honor's indulgence for a minute, so I can read this.

The Court: Surely. Take a seat and read the statement at your leisure. I will not wait while you have a discussion with your associates. I am giving you an opportunity to read the statement. Read it as expeditiously as possible. 3290

Mr. Solovei: I will do that.

The Court: Have you read the statement, Mr. Solovei?

Mr. Solovei: Yes.

The Court: Very well, you may proceed.

By Mr. Solovei:

Q. Now you just a little while ago told us your statement was made on April 5th or 6th in the District Attorney's office, is that correct? A. (No answer.) 3291

Q. That is right? A. I deducted that. I had no reason to memorize a date like that.

Q. You had no reason to remember? A. No.

Q. What? A. No.

Q. Is that right? Is that what you say? A. Yes, sir.

Q. Did you hear me just call the Court's attention when this statement was made? Did you hear me read the date? A. Yes, sir.

Q. What date did I read? A. The 23rd.

Q. Of what? A. Of March.

Q. What year? A. 1943.

Q. Now after I called your attention to the date, that is March 23, 1943, do you now change your testimony and say that it was not on April 5th or 6th that you made the statement? A. Yes.

Q. On April 5th or 6th of this year, you made no statement, is that correct? A. No, sir.

Q. As a matter of fact, you were not even in
93 the District Attorney's office at all, is that right? A. Yes, sir.

Q. So that the time you were over there on March 23, 1943, is that right? A. Yes, sir.

Q. Now when you made this statement was Detective Celano there? A. No, sir.

Q. You told us, however, a little while ago that when you did make a statement, that Detective Celano was there, is that correct? A. When I made the statement June 4th, he was there.

Q. To who? A. When I made the statement June 4th, he was there. He was not there that
94 time.

Q. When you made a statement on June 4th, was there a stenographer that took down that statement? A. No, when I talked to Mr. McGough.

Q. Now do you remember who was present on March 23, 1943, when you did make a statement to the District Attorney at the District Attorney's office? A. Yes, Mr. McGough and I, the stenographer.

Q. Just the two of you? A. Yes.

Q. There was nobody else in the room? A. I do not remember seeing anybody else there.

Q. It was in Mr. McGough's private room in the District Attorney's office? A. Yes, sir.

Q. Do you know what hour of the day you made a statement? A. It must have been about 8:30 or 9 o'clock.

Q. In the evening? A. In the evening.

Q. Do you know what time you arrived at the District Attorney's office on that day when you were examined and made this statement? A. It was later than that. It must have been between 9 and 10 o'clock that I made the statement. I 3296
arrived there about 9 o'clock.

Q. And was Mr. Van Ness in the room, this gentleman here? A. No sir.

Q. Seated at the District Attorney's table? A. No, sir.

Q. Were any of the detectives in that room when you made that statement that you saw here in this courtroom at any time either last week or this week? A. Repeat that, please?

Mr. Solovei: Will the stenographer please read it back to him? 3297

The Court: Yes.

(The question was repeated by the stenographer.)

The Witness: I don't understand.

By Mr. Solovei:

Q. What? A. Excuse me. I still don't know what you want.

Q. Well, did you ever see Detective Stephen Brady?

3298

Mr. McGough: That is objected to.
The Court: Objection sustained.

By Mr. Solovei:

Q. You saw many detectives around here since you are here?

Mr. McGough: That is objected to.
The Court: Objection sustained.

3299

Q. Have you seen any of the detectives that you seen around this courtroom at the times that you were here, that were in Mr. McGough's room on March 23, 1943, when you made a statement?

Mr. McGough: I object.
The Court: Objection sustained.
Mr. Solovei: Exception.
The Court: He has not said that there were any detectives in Mr. McGough's room, when he made the statement. You
3300 are assuming that he did; objection sustained.

By Mr. Solovei:

Q. Did I understand you to say, Mr. Shamin, that there were no detectives in Mr. McGough's room?

Mr. McGough: I object to it.
The Court: On what day?
Mr. Solovei: On the 23rd of March, 1943.

The Court: He may answer.

By Mr. Solovei:

Q. When you made a statement in his room? A. I don't remember seeing any detectives there.

Q. Well, was there any man, any male person, at all in the room outside of you, Mr. McGough, and the stenographer, if the stenographer was a male person? A. In that room?

Q. Yes. A. I don't remember seeing anybody in that room. 3302

Q. Well, if I tell you that the statement says that Detective George Lowe and Detective Thomas Connolly and Detective Stephen Brady were present when you made the statement in the District Attorney's office on March 23, 1943, would that refresh your memory?

The Court: I warn you that you are opening the door to that portion of this statement by referring to its contents. You are opening the door. Proceed.

Mr. Solovei: I object to your Honor's statement and I am only asking as to the— 3303

The Court: Proceed.

Mr. Solovei: —as to those three names.

The Court: You may answer.

The Witness: I still don't know what he wants. Will you kindly repeat the question?

The Court: Repeat the question. Do you press the question?

Mr. Solovei: I press the question.

The Court: Answer it.

Mr. Solovei: As to those three names.

3304 The Court: Repeat the question.

(The question was repeated by the stenographer as follows: "Q. Well, if I tell you that the statement says that Detective George Lowe and Detective Thomas Connolly and Detective Stephen Brady were present when you made the statement in the District Attorney's office on March 23, 1943, would that refresh your memory?")

3305 The Witness: (No answer.)

The Court: Answer the question.

The Witness: I have seen—that night, there were policemen around there. I don't remember if they were in the room while I gave my testimony.

Q. When did you quit Rouch's store, working, Mr. Shamin? A. I quit right after Easter.

Q. What month was that? Can you give us it, the month and year? A. About April, 1941.

Q. Wasn't it in March, 1941? A. I quit then,

3306 too.

Q. What? A. I quit twice.

Q. Oh, twice? A. Yes.

Q. You mean you quit in March, and you left for a while and came back to work? A. Yes, sir.

Q. And then you quit again in April? A. Yes, sir.

Q. And then you never returned to work? A. No, sir.

Q. Is that right? A. Yes, sir.

Q. Now when you spoke to the District Attorney in his office on March 23, 1943, in the evening of that day, you never told Mr. Mc-

Gough that the date was February 15, 1941, when you claim that you went to the hallway and there took a package at the request of Mr. Malinsky? Did you? A. I never claimed it was that date, no.

Mr. Solovei: That is all.

Mr. McGough: Will your Honor bear with me just a minute, please?

The Court: Yes. Where is Mr. Carabba?

3308

Mr. Morritt: I am prepared to cross-examine.

The Court: All right. Sit down, Mr. Carabba. Proceed.

By Mr. Morritt:

Q. Does the day of February 12th mean anything to you, Mr. Shamin, yes or no?

The Court: Is this cross-examination in behalf of the defendant Rudish?

Mr. Morritt: Yes, your Honor. 3309

The Court: Proceed.

The Witness: No, sir.

Q. Does the date of February 22nd mean anything to you, Yes or No? A. No, sir.

Q. You studied American history when you went to the High School of Commerce? A. Yes, sir.

Mr. Morritt: That is all.

The Witness: February 22nd is—

By Mr. Morritt:

Q. Yes? A. One of Washington or Lincoln's birthday, is that it?

Q. But you remember—February stands out in your mind, of 1941, because the school term began, is that it? A. Yes, sir.

Mr. Morritt: That is all.

By Mr. McGough:

Q. Now besides fixing the date as you said because it was several weeks after the start of the term—

Mr. Morritt: I cannot hear him.

The Court: Speak loud enough for Mr. Morritt to hear you.

Q. —there was also one other way that you fix the date, is that correct?

Mr. Morritt: I object to the District Attorney leading.

Mr. McGough: If your Honor pleases, this is cross-examination on new matter brought out by Mr. Solovei.

The Court: This is redirect examination.

Mr. McGough: Your Honor this witness was made his witness by Mr. Solovei, when he exceeded the grounds of cross-examination.

The Court: Let us not split hairs on that proposition.

Mr. McGough: Does your Honor sustain the objection?

The Court: Objection sustained.

By Mr. McGough:

Q. Do you recall telling me one other reason, Shamin, how you happened to fix the date as the 15th of February?

Mr. Morritt: Objection. 3314

Mr. Solovei: I object to that.

The Court: Objection overruled.

Mr. Morritt: I except.

Mr. Solovei: Exception.

Q. Listen to the question. A. Shall I answer that?

Mr. McGough: Will you read the questo him. Listen to it.

(The question was repeated by the stenographer as follows: "Q. Do you recall telling me one other reason, Shamin, how you happened to fix the date as the 15th of February?") 3315

The Witness: Yes.

By Mr. McGough:

Q. What was that? A. Malinsky had quit about a month before, and he quit about the middle of March.

Q. You were there when he quit, is that right? A. I was not there that day, but I missed him the following Saturday.

3316 *Peter Shamin—Rebuttal for People—Redirect*

Mr. Solovei: I move to strike out his answer.

The Court: Motion denied.

Mr. Solovei: Exception.

Mr. McGough: No more questions.

The Court: All right, step down.

Mr. Solovei: Just one question.

The Court: Yes.

By Mr. Solovei:

3317 Q. As a matter of fact, you just told us on several occasions here that you never mentioned the 15th day of February, 1941, to the District Attorney? Didn't you say that? A. Yes.

Mr. Solovei: That is all.

By Mr. McGough:

Q. But here in court, your best recollection is that it is February 15th? A. Yes, sir.

Q. 1941? A. Yes, sir.

3318

Mr. Solovei: I object to the question.

The Court: Objection overruled.

Mr. Solovei: Exception.

Q. Is that right? A. Yes, he showed me the calendar.

Q. And that was after you looked at the calendar? A. Yes, sir.

Q. And you swear under oath that that is the best date in your mind now? A. Yes, sir.

Mr. McGough: That is all.

Motion to Strike Out 3319

Mr. Multer: On behalf of the defendant Indovino, I move to strike out all the testimony of this witness, and I ask that the jury be instructed to disregard it.

Mr. Carabba: I make the motion, if your Honor pleases, on behalf of the defendant Rudish, that the jury be instructed that all the testimony this witness has given in so far as it concerned Rudish, has no bearing upon him.

The Court: Well, I have followed a 3320
consistent policy in this case of holding that the conversations between alleged co-conspirators are not binding on those not present, even when the conversation was had prior to the conspiracy, and even when it was in the furtherance of the conspiracy. I am fully acquainted with the principles of law that govern this subject.

Mr. Carabba: I do not question that.

The Court: But I am holding in favor of the defendants.

Mr. Carabba: You grant my motion? 3321

The Court: I am holding in favor of the defendants.

Mr. Carabba: You grant my motion?

The Court: Although I am fully familiar with the principles of law that govern this type of evidence; your motion is granted.

Mr. Carabba: Thank you.

The Court: Your motion is granted, too, Mr. Multer.

3322 *Nathan Spielfogel—Rebuttal for People—Direct*

NATHAN SPIELFOGEL, recalled as a witness by the People, in rebuttal, testified as follows:

Direct examination by Mr. McGough:

Q. Spielfogel, at the time that you first saw Malinsky at the Bossert Hotel, did you speak to him in Jewish? A. I did not.

Q. Did you ever speak to him at any time in
3323 connection with this case in Jewish? A. Not in Jewish.

Q. Did you ever tell Malinsky what to say to Lieutenant McNally or other police officers at any time in connection with this case? A. I never did.

Q. Did you ever tell him that you knew he had nothing to do with the case? A. What was that?

Q. Did you ever tell him that you knew he had nothing to do with the case? A. No, sir.

Q. Did you ever tell him that he better tell
3324 the police that he was connected with it or he would get beaten up? A. No, sir.

Q. Did you ever tell him that if he did not support your family, that you would frame him? A. No, sir.

Q. Did you ever tell him that if he did not support your family, you would break out of Sing Sing and you would kill him? A. No, sir.

Q. Did you ever tell him at any time that he killed Patrolman Fox? A. Never.

Q. Did you tell him anything about the door of an automobile sticking? A. No, sir.

Mr. McGough: That is all.

Nathan Spielfogel—Rebuttal for People—Cross 3325

Cross-examination by Mr. Solovei:

Q. Can you tell this Court and jury when you met Red Tiplet?

Mr. McGough: That is objected to.

The Court: Objection sustained.

Mr. McGough: As not proper cross-examination.

The Court: The objection is sustained.

Mr. Solovei: If it is not proper cross- 3326
examination—

The Court: There must be an end to this. It cannot go on and on. You are limited now to cross-examination on the rebuttal. Proceed, please.

Mr. Solovei: I can make him my witness if I want to. And I must be responsible if your Honor holds that rule.

The Court: Are you finished with the cross-examination?

Mr. Solovei: No, I am asking—

The Court: Cross-examine him, and 3327
then we will determine when you offer him as your own witness. Now, you are limited to cross-examination.

Mr. Solovei: I am asking your Honor at this time for permission to give me the privilege to examine this witness as part of my cross-examination; part of my original cross-examination.

The Court: Your application is denied.

Mr. Solovei: Exception.

The Court: In the sound discretion of the Court.

Mr. Solovei: I except.

The Court: There must be a finality to this proceeding. It cannot go on and on and on and on forever.

Mr. Solovei: I except.

The Court: You have the right to cross-examine him now on his rebuttal, and you have an absolute right to call him as your own witness, if you so desire.

By Mr. Solovei:

Q. You did tell the defendant Malinsky, "Do not worry, Moish, I know you did not commit this crime and nothing will happen to you"; didn't you? A. I never told him that.

Q. Never told him that? A. No.

Q. Do you remember riding from the Hotel Bossert to Coney Island?

Mr. McGough: That is objected to.

The Court: Objection overruled.

Q. Do you remember that? A. From the Bossert to Coney Island?

Q. Yes. A. I do.

Q. And do you remember how you went there?

Mr. McGough: That is objected to.

The Court: I will let him ask that question because it may have some remote bearing or direct bearing on the automobile, about the door.

The Witness: By automobile.

Q. By automobile? A. Yes, sir.

Q. Do you know which route you took? A. I don't remember.

Q. Did you go along the waterfront?

Mr. McGough: That is objected to.

The Court: Objection sustained.

Mr. Solovei: Exception.

The Court: Proceed.

Q. You did go with him to Coney Island, didn't you? A. Yes.

3332

Q. And detectives, is that right? A. Yes.

Q. You have been in Coney Island on a great many times, haven't you? A. Plenty of times.

Q. What? A. Plenty of times.

Q. And you know where the Cosmo Restaurant is there, don't you? A. Yes.

Q You know where Loew's Theater is there, don't you? A. Yes.

Q. You know where the Brooklyn Trust Company is there, don't you? A. I don't know where.

Q. What? A. I don't know about the Brooklyn Trust Company until I was told about it. 3333

Q. The bank? A. That is right.

Q. And you have been in the Cosmo Restaurant many times, haven't you? A. The Cosmo?

Q. Yes. A. Maybe once.

Q Maybe once? A. Once or twice; I don't remember.

Q. And you were in the Famous Restaurant there, too, weren't you? A. The Famous?

Q. Yes. A. Only in the Cosmo.

Q. Were you in the Cosmo Restaurant in May of 1941?

Mr. McGough: That is objected to.
The Court: Objection sustained.
Mr. Solovei: Exception.

By Mr. Solovei:

Q. When you came to the Cosmo Restaurant, you said to Malinsky, "This is the spot," didn't you? A. I was never there with Malinsky. What do you mean? If I was there the same night when he re-enacted the crime?

3335 Q He was there in February with you, wasn't he? A. February? Yes.

Q. You were all in the car together with Detectives, weren't you? A. I don't know if that was February. I don't know what date it was.

Q. You just said it was February, is that right? A. I don't remember the date.

Q. Can you remember the month you were there? A. The month?

Q. Yes. A. I imagine it was about two weeks after I come down from Sing Sing.

Q. What month was it? A. I think it was

3336 October.

Q. You think it was October? A. I don't know what month it was.

Q. Was it after Election? A. I don't know.

Q. What? A. I don't know.

Q. Didn't you, when you were at the Cosmo Restaurant, in any event with Malinsky, you said to him, "This is the spot", in Jewish? A. No.

Q. Didn't you? A. Never told him that.

Q. You speak Jewish, don't you? A. Yes, sir.

Q. Did you go to the Bath Beach police station? A. I did.

Q. Do you know when you were there? A. The same night that I was out in Coney Island.

Q. Were you at the Bath Beach police station more than once? A. I think twice.

Q. Did you go with Malinsky to where this automobile, this Ford car was parked on Meeker Avenue? A. I did not.

Q. Were you at the police station when Malinsky came back from the garage at Meeker Avenue? A. I think I was in the Jail.

Q. What? A. I think I was in the Jail at that time. 3338

Q. Weren't you down the police station when he came back? A. I don't remember being there.

Q. Were you at the Bath Beach police station when the pictures of the automobile were in the police station? A. Pictures?

Q. Yes. A. I don't remember seeing any pictures.

Q. You did not see any pictures of the automobile at any time? A. At any time, yes.

Q. When did you see the pictures of the automobile? A. In the newspaper.

Q. Did you see any pictures in October 1942, 3339 when you were at the Bossert Hotel or at the Bath Beach police station? A. What was that?

Q. Did you see any pictures of the automobile while you were at the Bossert Hotel or at the Bath Beach police station in October 1942? A. No.

Q. You mean, you did not show Malinsky any pictures of this automobile? A. He did not have to be shown.

Q. I am asking you a question; you did not, did you? A. No.

Q. You are anxious to help him, aren't you? Aren't you? A. (No answer.)

Q. Aren't you? A. (No answer.)

Q. Aren't you, Slip? A. At one time I would; I would.

Q. You what? A. At one time, I would have.

Q. You are really angry at him, aren't you?

Mr. McGough: That is objected to. This is not proper cross-examination.

3341 The Court: Well, he has been over it before and he may go over it once more.

Mr. McGough: All right.

Q. You are real angry at him, aren't you? A. This minute? Now?

Q. Now, and yesterday and all week, and all month; yes. A. Yes.

Q. And you would go out of your way, if you could, to hang him, wouldn't you? A. I would not send nobody to the chair for something they didn't do.

Q. You would not send anybody to the chair
3342 for something they did not do, is that right, Slip? A. That is right.

Q. You had nothing to do with this crime, did you? A. Not a thing.

Q. You knew everything in minute detail how this crime was committed, and you had nothing to do with it, you and Yellin? A. Your defendant.

Q. Is that right? A. (No answer.)

Q. Is that right? A. Tell me it over again.

Q. I say, you and Yellin had nothing to do with this crime, and you know in minute detail everything that happened on the evening of Feb-

ruary 15, 1941, is that correct? A. You are making it too big. Cut it down a little bit so I can understand it in my own language.

Q. I say, you gave this jury a detailed description as to how this crime was committed on February 15, 1941, is that correct? A. That is right.

Q. And you say, you and Yellin and Beitler had nothing at all to do with this crime, is that right?

3344

Mr. McGough: That is objected to. He did not say he gave a minute detailed description.

The Court: Objection sustained. He did not say Beitler had nothing to do with it, did he, Mr. Solovei?

Mr. Solovei: Will you read the question to me?

The Court: Read it.

(Question repeated by the stenographer as follows: "Q. And you say, you and Yellin and Beitler had nothing at all to do with this crime, is that right?")

3345

Mr. Solovei: I will reframe the question.

The Court: Yes.

Q. And isn't it a fact that you, Yellin, Beitler, and one of your other cronies, whether it be Kovner, whoever it was, aided and assisted him in the commission of the crime?

Mr. McGough: I object.

The Court: Objection overruled.

Q. Isn't that right? A. No, sir.

Q. What? A. We did not help him. We did not go on it.

Q. You did not go on it? A. No.

Q. You knew it was getting pretty hot for you and Yellin in October 1942, when the investigation was coming up towards Sing Sing, didn't you? A. No, sir.

Q. You knew they were up in Sing Sing asking you and Yellin questions about the Fox murder, didn't you? A. Yes, they come up to Sing Sing.

Q. And you knew that somebody had squealed on you and Yellin, that you and Yellin and Beitler participated in the Fox killing, didn't you? A. No, sir.

Q. Well, nobody living could have known that you and Yellin knew anything at all about the Fox killing unless somebody brought some information to the police, is that correct?

Mr. McGough: That is objected to.

The Court: Is that a proper question, or is that argument?

Mr. Solovei: Maybe you are right. I will withdraw it.

The Court: Maybe I am right?

Mr. Solovei: I said, you are right. I will withdraw it.

The Court: At least you are charitable when you say maybe I am right.

Mr. Solovei: I will withdraw it.

The Court: Proceed.

Mr. Solovei: Now if during my examination, your Honor, I do not care whether you call him my witness or anybody's witness, I am going to finish—

The Court: Are you finished with him on cross-examination?

Mr. Solovei: I might be going into collateral matters.

The Court: If you wish, I will indicate that the cross-examination is finished, and then I will permit you to call him as your witness.

Mr. Solovei: This is on cross-examination. I am going to ask your Honor again to give me permission to examine this man, if only for a short time, on cross-examination instead of recross-examination. 3350

The Court: All right, go ahead. Let us get it over with.

Mr. Solovei: I will make it very short and be to the point.

The Court: Proceed.

By Mr. Solovei:

Q. You told us here that about six months after you got up to Sing Sing, you spoke to Kovner, is that correct? A. Six months? 3351

Q. Yes. A. I don't write it down when I talk to anybody.

Q. You said that here when you were examined the first time. A. I don't know the exact date that I talked to him.

Q. I am asking you, didn't you say that when you were examined here the other day? A. Did I say it?

Q. Yes. A. Six months after I was up there?

Q. Yes. A. Maybe I said it, but I don't remember.

3352 Q. Do you now say that it was not six months?

The Court: Are we going to go over the same business again. Once you get a point, you are half an hour on the point, and then you go to the next question and are the same time. I am not going to limit you but there must be an end to this.

Mr. Solovei: There is something developed—

3353 The Court: Go to something else. I do not want to restrict you but there must be an end to this trial. It cannot go on forever.

By Mr. Solovei:

Q. Let me ask you this: can you tell this Court and jury when it was that Kovner left Sing Sing Prison? A. Left?

Q. Yes.

The Court: If you know.

3354 The Witness: I don't know; I don't remember.

By Mr. Solovei:

Q. Did Kovner tell you while you were in the room, when he went up to Attica from Sing Sing, where he is now confined—

Mr. McGough: I object.

The Court: Objection sustained.

Mr. Solovei: Exception.

By Mr. Solovei:

Q. You and Kovner have been very friendly, is that correct? A. No, sir.

Q. How long have you known him? A. About eight years.

Q. How long have you known Beitler? A. About five.

Q. You have been very friendly with Beitler? A. Friendly, yes.

Q. And you, Beitler, Kovner and Yellin were friends and associates, isn't that correct? A. What do you mean? 3356

Q. What I mean is, you were very friendly, weren't you? A. I was friendly. Yes, I was friendly with all of them.

Q. You have been out on jobs with Yellin and with Beitler and with Kovner at different times, weren't you? A. No, sir.

Q. What? A. No, sir.

Q. Is Yellin the only man you went out on a job with, of the four that I just mentioned? A. That is right.

Q. Did you go out with Beitler? A. No, sir. 3357

Q. Now this man Eisler that was here, that testified, do you remember, Red Tiplet, they called him? A. Yes.

Q. Did you talk to Red Tiplet in December of 1940? A. December?

Q. Yes. A. Yes, I spoke to him.

Q. And where did you speak to him? A. At the Citadel Club.

Q. And did Red Tiplet tell you that he went for a package for some guns?

The Court: Objection sustained.

Mr. Solovei: Exception.

3358 By Mr. Solovei:

Q. Did you have a conversation with Red Tiplet about a package?

Mr. McGough: That is objected to.
The Court: Objection sustained.
Mr. Solovei: Exception.

By Mr. Solovei:

3359 Q. Did Red Tiplet ever tell you that he went to get a package for Malinsky at any time?

Mr. McGough: That is objected to.
The Court: Objection sustained.
Mr. Solovei: Exception.

By Mr. Solovei:

Q. Did you see Red Tiplet in January of 1941?

Mr. McGough: That is objected to.
3360 The Court: Objection overruled.
The Witness: January?

By Mr. Solovei:

Q. Yes. A. I don't remember.

Q. You say you saw him in December 1940 at the Citadel Club, is that right? A. In December?

Q. Yes. A. That is right.

Q. How often did you see him there that month?

Mr. McGough: That is objected to.

The Court: Objection sustained.

Mr. Solovei: Exception. Does your Honor sustain it on the ground that it is improper cross-examination?

The Court: I am sustaining it.

Mr. Solovei: I thought your Honor gave me leeway in cross-examination.

The Court: I am sustaining the objection. You have your exception.

Mr. Solovei: Exception. 3362

The Court: Please be good enough to proceed.

By Mr. Solovei:

Q. You and Red Tiplet were very friendly?

Mr. McGough: That is objected to.

The Court: Objection overruled.

By Mr. Solovei:

Q. Weren't you? A. I was not friendly with 3363 him.

Q. What? A. I was not very friendly with him.

Q. How long did you know Red Tiplet before December 1940?

Mr. McGough: I object.

The Court: Objection overruled.

The Witness: Well—

By Mr. Solovei:

Q. How long did you know him before December 1940? A. About five years, I knew him.

3364 *Nathan Spielfogel—Rebuttal for People—Cross*

Q. So that the first time you met him, would you say, was around 1935? A. About—no, about '37 or '38.

By the Court:

Q. Were you intimate with him? Was he a pal of yours? A. No, he was not a friend of mine. I just knew him. He was just a kid from the neighborhood.

3365 By Mr. Solovei:

Q. Did you ever send him to get any packages for you? A. Never.

Q. Did he ever go on any errands for you? A. Errands?

Q. Yes. A. Never.

Q. Did Red Tippler ever tell you that he ever got a package for Malinsky?

Mr. McGough: That is objected to.

The Court: Objection sustained.

3366 Mr. Solovei: Exception.

By Mr. Solovei:

Q. Slip, you and Yellin are trying to save yourself from being indicted or implicated in this Fox murder, aren't you? A. What are you, kidding me?

Q. I am asking you. A. No.

Q. When you were first being interrogated about this case, didn't the police tell you that, "We have information that you and Yellin were

implicated in the Fox murder"? Didn't they? A. Never. They never told me I was implicated.

Q. They never told you that? A. No.

Q. And you never spoke to a soul in the world about what you knew about the Fox case other than what you said—

Mr. McGough: I object.

The Court: Objection overruled.

Mr. Solovei: That is all.

The Court: Step down. 336

Mr. McGough: The People now rest.

The Court: Any other evidence on behalf of the defendant Malinsky?

Mr. Solovei: No, sir.

The Court: The defendant Malinsky rests?

Mr. Solovei: Malinsky rests.

The Court: Any more evidence in behalf of the defendant Sidney Rudish?

Mr. Morritt: Yes, your Honor.

The Court: Proceed.

Mr. Morritt: Thank you. Call the witness Biaggio Franchese. 336

The Court: Gentlemen of the jury, step out. Please do not discuss the case and keep your minds open. The jury will step out.

(The jury retires from the courtroom.)

The Court: What do you propose to show by this next witness, Mr. Morritt?

Mr. Morritt: I intend to show that this witness confessed to the murder of Fox and he gave his confession under police beatings and I intend to show that later

3370 he was allowed to retract his confession, but that he gave a full confession as to the Fox murder in September 1942, identified the car, and said he was in Coney Island, exactly as Slip and Yellin spoke.

The Court: Do you propose to show that he is an innocent man?

Mr. Morritt: I propose to show—

The Court: Is that what you propose to show?

3371 Mr. Morritt: I intend to show—

The Court: That at one time he confessed?

Mr. Morritt: I intend to show that he confessed to this murder.

The Court: Is he going to confess from the witness-stand?

Mr. Morritt: He certainly will not.

The Court: I rule the testimony out.

Mr. Morritt: I respectfully except.

The Court: You have your exception. Bring back the jury.

3372 Mr. Morritt: May I state for the record that I intend to show in addition to what I stated, by this witness to show that others were implicated by this same defendant and by others, and the same category as was done in this case by the detectives.

The Court: You mean others were implicated by Franchese?

Mr. Morritt: Yes, sir.

The Court: And what Franchese said was untrue, and it was the result of beatings by the police?

Mr. Morritt: Yes, sir.

The Court: And they extorted a confession from him?

Mr. Morritt: Yes, sir.

The Court: And that they used the "third degree" on him?

Mr. Morritt: Yes, sir.

The Court: And that he is an innocent man?

Mr. Morritt: Yes, sir.

The Court: In other words, you are prepared to have Franchese say that he committed this murder?

Mr. Morritt: Oh, no.

The Court: I rule out this testimony.

Mr. Morritt: Of course, I intend to prove that he was an innocent man, too. There is no question about it.

The Court: I rule out this testimony and you have your exception. Bring back the jury.

Mr. Carabba: Judge, yesterday you promised that we would have an opportunity to offer in evidence the lumberjack of Mr. Rudish.

The Court: I do not think that is really material.

Mr. Carabba: It is material to this extent—

The Court: Wait, Mr. Carabba. The defendant testified that he did not get the lumberjack until toward the end of 1942.

Mr. Carabba: That is correct.

The Court: If I am correct in my assumption.

Mr. Carabba: Substantially correct.

3376 *Renewal of Motion to Dismiss Indictment Against Defendant Malinsky*

The Court: He said he never owned a lumberjack.—

Mr. Carabba: That is true.

The Court: —before that, so therefore the color of the lumberjack that he wore in 1942 has no bearing on what he wore in 1941. I will sustain the objection.

Mr. Carabba: There is evidence here that this man wore a different color lum-
3377 berjacket.

The Court: He said he never had the lumberjack, so the fact that he has a lumberjack in 1942, in the fall or winter, has no bearing on whether or not he wore a lumberjack in 1941 and what its color was. I will rule out the lumberjack and give you an exception.

Mr. Solovei: The offer that Mr. Morritt made, may I join in that offer of the evidence that Mr. Morritt made?

The Court: Same ruling.

3378 Mr. Solovei: And may I have an exception on behalf of the defendent Malinsky?

The Court: Yes.

Mr. Solovei: While the jury is out, may I now renew my motions?

The Court: I will hear motions now.

Mr. Solovei: I now renew my motion to dismiss the indictment and discharge the defendant upon the grounds that the People have failed to make out a case against the defendant Malinsky by reliable, credible, believable testimony beyond a reasonable doubt.

The Court: Motion denied.

Mr. Solovei: And upon the further ground that they have failed to connect the defendant as aiding and abetting one Beitler, Beitler is alleged in the indictment to have committed this crime of murder.

The Court: Motion denied.

Mr. Solovei: Exception.

Mr. Carabba: I make the same motion verbatim for and on behalf of the defendant Rudish, and I ask at this time, respectfully, sir, that you examine the minutes of the Grand Jury in this case, in view of what has been brought out on this record, I specifically request of this Court to examine the minutes of the Grand Jury in this case.

The Court: I hold that there is nothing before the Court which warrants such action. There is nothing that has been shown affirmatively to warrant such action. Your motion is therefore denied.

Mr. Carabba: I respectfully take an exception.

The Court: Counsel for Indovino.

Mr. Multer: On behalf of the defendant Indovino, first I want to make an offer to prove through Biagio Franchese, the same person who was identified on the record during Mr. Geoghan's cross-examination of one of the witnesses, that he confessed—

The Court: You mean you want to show the same thing that Mr. Morritt just urged?

3382 *Colloquy*

Mr. Multer: A little more.

The Court: What more do you want to say?

Mr. Multer: And that one Henry Ferguson, now convicted, in Sing Sing Prison, confronted Franchese, and in the presence of the police and the District Attorney, said that he, Henry Ferguson, and one other, acting in concert with Ferguson, stole the very automobile identified on this
3383 record as the automobile used in the commission of this crime.

The Court: Do you wish to produce Ferguson as a witness, who will swear that it is the truth that he stole the automobile. Yes or No?

Mr. Multer: I cannot say—

The Court: No, no—

Mr. Multer: I have not interviewed Ferguson.

The Court: Please, please; answer my question; do you wish an opportunity to
3384 call Ferguson, who is prepared to say that he is the man who stole the automobile in question, and/or that he stole it for Franchese's use upon the Fox killing? Do you want to offer such evidence? As to what Ferguson said in the backroom of the station house, I am not interested in that. Do you want an opportunity to bring Ferguson to the stand? I will give you that opportunity. If you have any evidence to show that your client is innocent, I will give you the opportunity to produce it, but as to what happened between other

people and policemen in the back room of a station house, that is of no interest here to us.

Mr. Multer: After consulting with my associates—

The Court: A million men may have confessed in the back room of the station house, and they may have confessed at the end of the rubber hose, but that does not prove the guilt or innocence of these defendants, and we are interested only in their guilt or innocence, and not with the guilt or innocence of anybody else. They are on trial here, not Franchese or anybody else. If you want to show that the police officers of the City of New York, or that the police officers in this case are brutes, and resorted to what is commonly known as the "third degree" methods, I will not permit you to show it in this fashion. Your motion is denied. Bring back the jury.

Mr. Multer: I have not made my other motion yet, and that also applies to the fact that the same Assistant District Attorney took both confession, one from Malinsky and one from Franchese.

The Court: That would not alter the situation one iota. In other words, I am not going to permit this jury to wander far afield from ths issues in this case. We are not going to try out the Police Department in this court. I take it that is counsel's objective but we will not do it.

Mr. Multer: I take it that your Honor

3388 *Renewal of Motion to Dismiss Indictment Against Defendant Indovino*

will not receive in evidence the statement that the District Attorney took from Franchese and Ferguson, in which they both implicated themselves in this crime.

The Court: I will not. In view of your statement, that they are both innocent.

Mr. Multer: I don't know whether they are innocent.

The Court: I will give you an opportunity to produce Franchese, if you wish. He is now in the courtroom. You may call him as your witness, and I will permit him to testify that he is the man that killed Fox, or that he is the man that participated in the robbery; or that he had anything to do with the crime, in order to exonerate either wholly or partly any of the defendants on trial; or I will permit you—and I will permit you to bring Ferguson or any other person to this witness-stand, who will testify that he or they stole the car, or that he or they are the persons who committed this crime, or had a part in its commission; but to permit you to bring testimony here as to what happened in the station house between a group of detectives and some people, I will not permit you to do that. Your record is amply protected. I have ruled. There is no question about the way I have held. There is no question about your position. Proceed to the next point.

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Mr. Multer: The defendant Indovino renews all of the motions made on his behalf at the close of the People's case

Renewal of Motion to Dismiss Indictment Against Defendant Indovino 3391

and asks for a dismissal of the indictment on the grounds then urged, and also asks for a dismissal of the indictment in this motion and asks that the Grand Jury minutes be made a part of the motion; that the testimony and proof adduced and received here at this trial in support of this indictment, varies from that which was submitted to the Grand Jury, and that this indictment is based upon faulty and 3392
insufficient evidence to warrant an indictment; and that the proof received here also is in variance with and differs from the indictment and the District Attorney's opening.

The Court: Now just stop there and let me rule on that motion. I deny your motion for the following reasons; that at no time during this trial, while any of the People's witnesses were on the stand, did you ask the Court to let you have the testimony of any particular witness in line 3393
with the Walsh case, and in line with the Lemon case, so that the Court might examine the testimony and determine whether the testimony given by any of the witnesses who appeared here, and who may have testified before the Grand Jury, contradicted themselves. In other words, that the testimony was different before the Grand Jury from the testimony here. On that ground, I deny your motion and deny your motion on the further ground that there is nothing before this Court now

3394 *Colloquy*

which warrants the granting of this motion.

Mr. Multer: On behalf of the defendant Indovino, we ask that the Grand Jury minutes be examined by your Honor for the purpose we indicated and that is an additional ground for the motion I urge; the ground I urged was that the evidence was not submitted to the Grand Jury to substantiate this indictment.

3395 The Court: There is nothing before the Court which affirmatively bears out your statement. There is nothing conceded by the District Attorney to the effect that the only testimony before the Grand Jury was the testimony of an accomplice uncorroborated by any other testimony; and I think at the present time the Court is not in a position, nor is the Court required under the law to start an examination of the Grand Jury minutes to determine at this stage of the proceedings whether or 3396 not the evidence adduced before such body was sufficient as a matter of law. Your motion is denied. Bring back the jury.

Mr. Carabba: May I, your Honor please, say something? Will your Honor bear with me and listen to me?

The Court: Surely.

Mr. Carabba: I respectfully make the same identical motion on behalf of the defendant Rudish. I call your Honor's attention, respectfully, that I asked on cross-examination of the witness Spielfogel—

The Court: You have the minutes—

3397

Mr. Carabba: —that he did not testify before the Grand Jury.

The Court: That is right.

Mr. Carabba: And for that reason I ask your Honor now to examine the minutes of the Grand Jury in this case because there is evidence here that has been brought out by the prosecution that points that this indictment was founded on insufficient evidence as a mater of law.

The Court: I do not know who testified before the Grand Jury. 3398

Mr. Carabba: I do know.

The Court: I know that Spielfogel did not, because he said so.

Mr. Carabba: He said so.

The Court: Nobody knows who testified before the Grand Jury. Now the point of law, I take it, is this; boiled down in simple language, it is your contention that the Court upon request of counsel must at any stage of the proceedings—

Mr. Carabba: When requested.

The Court: —when requested, examine 3399 the Grand Jury minutes to determine whether or not evidence sufficient as a matter of law has been adduced in order to warrant the finding of an indictment. Is that your point?

Mr. Carabba: That is my point.

The Court: I have ruled against you. I have ruled that the Nitzberg case does not apply.

Mr. Carabba: Exception. May I ask as to this particular witness Yellin, may I

3400 ask in your Honor's ruling, that the minutes of the Grand Jury be marked for identification? I make that request on behalf of the defendant Rudish in view of the fact that Spielfogel—

The Court: Pardon the interruption, Mr. Carabba. So that we can shorten this matter, in the event that there should be a conviction in this case, you may at that time aply upon motion to have the Grand
3401 Jury minutes made a part of the case on appeal, and the Court will then rule upon that motion.

Mr. Multer: That is my point, that then it may be too late to do that. We did this on Saturday morning and repeat it now.

The Court: If it is too late then, I commit error. That is clear because your record is amply protected. The fact that you have made your application, as you deem it in good season, protects your record, doesn't it?

3402 Mr. Carabba: Does your Honor deny my request to have the minutes of the Grand Jury in this case marked for identification?

The Court: I do not think there is any necessity for it.

Mr. Carabba: I say, respectfully, sir, that it is our duty, as asigned counsel to request the Court to make an examination of the Grand Jury minutes.

The Court: I have considered your argument, Mr. Carabba, and I overrule your contention.

Mr. Carabba: May I respectfully except?

The Court: You have your exception.

Mr. Multer: The defendant Indovino also asks that the minutes be deemed marked for identification also as part of his application.

The Court: Your motion is denied.

Mr. Multer: Exception.

(The jury returned to the courtroom.)

The Court: How about the summations, 3404
gentlemen? I am going to follow the indictment.

Mr. Solovei: We have agreed upon it and I was making preparations accordingly. I worked until 11 o'clock last night trying to get some papers out. I am working under a handicap here. I am borrowing the testimony because my client could not afford to buy the testimony, from the other assigned counsel.

The Court: How long do you expect to take?

Mr. Geoghan: I will be finished in forty 3405
minutes.

Mr. Carabba: I did not expect to go on today.

The Court: Gentlemen of the jury, I hope you are going to bear with me and trust to my judgment, because I know how those things work out, and when a thing is rushed unnecessarily, and people work under pressure, it does not do anybody any good. We might work late tonight and get this case to you sooner; then have summations tomorrow and send you out

3406 *Colloquy*

tomorrow at 7 or 8 or 9 o'clock at night, but in a case involving three defendants, with a mass of evidence, it would not work as much towards substantial justice as if you took the case earlier in the day and you had the whole day before you, and you were at ease and comfort, instead of listening to summations and charges for two days on end and be sent out late at night to deliberate in a case as important
3407 as this. You have been so nice about it that I am going to ask you to be tolerant just a little bit more. I thought rather than split up the summations, having some today and have some tomorrow, I thought we could have all the summations finished tomorrow.

Mr. Carabba: That is a very good suggestion.

The Court: So be prepared for all the speech-making tomorrow on the part of the attorneys, and then the speech-making
3408 on the part of the Judge the following morning. I would really like a little opportunity myself to go over all of this testimony so that I may be accurate when I charge you; so please forgive me if I trespass upon your time for just a little while longer. It is now almost four o'clock, and counsel might want a little opportunity to go over their notes anyway.

Mr. Carabba: I think that is very fair.

Mr. Geoghan: I was prepared to go on now but it is all right with me to go over to tomorrow.

Colloquy 3409

The Court: We will have the summations all day tomorrow, and then I will charge you the first thing Thursday morning.

Mr. Solovei: That is entirely satisfactory.

Mr. Solovei: That is entirely satisfactory.

The Court: Mr. Foreman and Gentleof the jury; we are about to take a recess until tomorrow morning at ten o'clock. I 3410
admonish you not to discuss this case among yourselves or with any other person, or permit anyone to speak to you about this case or discuss it in your presence. You must keep your minds open. Do not form or express any opinion or conclusion as to the guilt or innocence of the defendants on trial or either of them or any of them until the case is finally submitted to you for your consideration after a charge on the law. You are also admonished not to read anything about the 3411
case in the public press in the event any article concerning this case may appear therein. You may now retire and return here tomorrow morning at ten o'clock.

(The jury retires from the courtroom).

The Court: The defendants are remanded.

Recess to 10 a. m., June 23, 1943.

3412 *Summation on Behalf of Defendant Indovino*

Brooklyn, N. Y., June 23, 1943.

After Recess. Trial Resumed.

(Mr. Geoghan made a closing statement on behalf of the defendant Indovino as follows):

Mr. Geoghan: May it please the Court.

The Court: Mr. Geoghan.

Mr. Geoghan: Mr. District Attorney, Counsel for the defense, Foreman and Gentlemen of
3413 the jury: I rise at this time to address you on behalf of the defendant Indovino, and on behalf of Indovino alone. I would like you gentlemen, as far as you can, and it will not be a difficult task, to keep in mind while I am summing up this case for you, that Indovino is the only one in court and the only defendant in this case, because my references will be to him and to him alone. I always feel in a sort of apologetic mood as I stand before the jury at the close of testimony to sum up the case because I am always fearful that the jury might have in mind
3414 that I am trying to convince them of a certain thing that is rather difficult to convince them of, and to change their minds. That is not the purpose of summation at all and it is not my purpose in addressing you at this minute. My purpose is to reason with you and to sort of think out loud; to be for the moment a member of the jury, discussing the case with you, with the view to arriving at the truth.

The purpose of a trial, of a criminal trial, is to find out where the truth lies. We here call witnesses whom you have seen, you have observed and you have listened to. They have

3415

been asked questions and they have made replies. We might just as well be discussing this case in an informal way in our living room, and after discussing it backwards and forwards, pro and con, then we come to the conclusion as to what really did happen in connection with the case. Now instead of such an informal talk, we have formalities. We have witnesses, testimony, and then you are called upon to determine whom you believe and what you believe, and then arrive at a conclusion.

3416

On the 15th of February 1941, in Coney Island, a dastardly crime was committed; a cowardly murder was committed. I don't know anything that is more reprehensible than to shoot down in cold blood a police officer, who is in the performance of his duties. That to me is the most despicable kind of crime that can be committed, and I do not condone it. Whoever is responsible for the murder of Leon Fox deserves the severest penalty, the severest punishment that can be passed upon him or upon them. I probably am more concerned that a policeman is the victim because of my association with them for seventeen years in the District Attorney's office. I know those men. I came to be very fond of them because I do not know of a more loyal set of public servants than the members of the Police Department of the City of New York. It is a terrible thing even to be charged with the killing of a police officer.

3417

However I know that you gentlemen as you sit there meant what you told me when you were being examined, and that is that you would not because a police officer was the victim, enter the

box with a feeling of prejudice against one who was charged with killing a police officer; but that you would consider the case just the same as if the victim were somebody else.

I am very grateful indeed that we have a Special Panel Jury in this case, men of superior intelligence; men who occupy executive positions; men who are in the upper scale in the line of human endeavor; men who have had a vast amount of experience, and men whom it
3419 will be very hard to confuse because that is the kind of a case that might confuse a juror. It is a difficult case for a judge to preside over, and you noticed the quickness with which he had to make decisions as to whether one line of testimony refers to one defendant and another line of testimony probably to two other defendants, and keep his mind open and clear all the time for fear any evidence might go in against one defendant, when it should only be admitted as to another or others. It is a difficult case to preside over. Therefore it is a
3420 difficult case for jurors, and if the District Attorney, who usually makes the motion, and I should say who always makes the motion for a Special Panel, had not made it in this case, I should have done so myself.

Now we have had a great parade of witnesses here submitted for your consideration by the District Attorney, and I am just going to say a word about each one and pass along quickly to those witnesses with whom the defendant Indovino is concerned.

Dr. Marten, you remember, was the first witness called. He is the Medical Examiner. You

always have a Medical Examiner or at least one who performs an autopsy in a homicide case because we have to prove the cause of death. If Leon Fox had died a natural death, from pneumonia or something like that, not caused by a gunshot wound, or anything that might have happened on the occasion of the shooting, then we would have no case; no homicide case at least; so he testified that this man died of certain injuries caused by gunshot wounds.

He was preceded on the stand—I said he was 3422
the first witness but I was mistaken—he was preceded on the stand by the brother of Leon Fox who testified that his brother was the one upon whose body, whose dead body Dr. Marten performed the autopsy.

Then you had Anthony DeSario, the draftsman of the survey that was offered here in evidence, and his testimony was simply formal.

Then Herman Dolinsky, who was the manager of the theater, who told you about what happened so far as he observed it, and so far as he recalled it at the time that this robbery 3423
was committed and this homicide was committed. He told you, if you recall, that one man jumped out of the automobile, fired shots, pushed him away and so forth, and he later on identified the car that he had seen for just a few seconds, as the car that was used at the time that the shooting occurred.

Then Max Kallman said he heard shots and notified the officers, and he was not questioned if you recall by defense counsel because he did not add anything to the case so far as Indovino was concerned and so we passed him on.

Then Mr. Rabbitt, the Police Officer, testified that he drove Fox to the Coney Island Hospital after the shooting occurred. Then Lieutenant George Bremeier said he was at the scene of the crime and he added nothing of importance to the case, but he was a witness just the same.

Then Officer George L. Corboy, who was attached to the 60th Precinct, testified that he was the one, if you recall, that discovered the Ford car at 2844 Stillwell Avenue in Coney Island.
3425 He described the bullet hole in the fender, if you recall, and he is the one that found the brown fedora hat that was offered and admitted in evidence in this case.

Then Detective Edward Basch testified that he marked his initials on the sweatband of that hat after Corboy had delivered it over to him.

Private Benjamin Glodowsky, and I don't know why the Private was brought up, but it is a nice trip from Texas, testified that he heard shots at 12th Street and Surf Avenue and he called the police on the telephone. He saw no
3426 persons in the car, at least recognized no persons, and saw the car shooting out from the curb. Though he saw that car as he testified only for one or two seconds, he identified the car as the car that he saw.

Julius Gimbel was the next witness. He said he was employed by E. W. Bliss & Company, and that he saw three men in the car. He described them; described them very minutely. They were sitting in the car, he said, as it sped by, but he could not tell whether they were short or tall. He was a very observant witness, if you remember. He did not see them standing. He saw

them sitting. He knew this exactly, "I won't say how tall they were", but he knew they were not tall men, they were short men, but all of that I am not concerned with, representing Indovino. However that is the testimony.

Then we have another soldier who came on from some distant point, and he was the owner of the stolen car mentioned in the trial. Of course, as far as Indovino is concerned, that does not make any difference whether it was a stolen car, or a private car or any car that was 3428
used at all. We concede the fact, and it is conceded on the record, and Indovino concedes the fact that Patrolman Leon Fox was killed, shot and killed during the course of the commission of a robbery. We did not kill him. Indovino did not kill him. Indovino had nothing to do with it. We conceded it, and all this testimony that I am reading to you means very little except formal proof of the death and the identification of the body. However he testified that it was his car, and a stolen car.

Then Detective John Trusch testified. He was 3429
the ballistics detective, if you remember. He described the bullet holes in Fox's overcoat. Well, that added nothing to the case because it was already testified that Fox died as the result of gunshot wounds, so what the purpose of his testimony was, I will leave to you gentlemen to determine.

But then we come to a very important witness as far as this record is concerned in connection with my client, and that is one of these fellows that came down from Sing Sing Prison employment agency, where testimony is manufactured

while you wait, and where witnesses are furnished on the shortest possible notice. Dave Yellin comes down. He is the gentleman doing 10 to 20 years, as I recall, for a robbery, and while on the stand painted himself as the gunman that he was and would be if he were still free.

Now they have to put Indovino into this conspiracy. The District Attorney concedes that Indovino was not at the scene of the crime, so
3431 they make a tipster out of him. I do not know what they needed a tipster for in this case. The man left the theater and walked along a public highway, to be seen by anybody. This was not the case of an inside job where a man is working in a bank, or in some financial institution, where certain hours certain things are done, and he plans it and tells them things that they would not otherwise know themselves. This tip is simply, according to the prosecution, a conversation in the public streets of New York City where he is supposed to have said to Beitler,
3432 "There is an easy touch down in Coney Island. A man leaves the theater there and goes over to the bank and deposits money and the police officer with him, and that he won't put up any resistance". Well, let us see what he says.

On page 127 of the record, Yellin was being questioned at this time:

"Q. How long do you know Indovino? A. About two and a half years now.

"Q. Did you know him under any other name besides Joseph Indovino? A. Yes.

"Q. Tell us what it was. A. Joe Tiger."

You know it is a certain psychology that the prosecution employs in connection with a case

of this kind, and that is to get an alias on the record if it is possible because it is a sort of smearing process, and at the same time it conveys to the jury, or they seek to convey to the jury that he is a very, very low character because he has a sobriquet, an alias. Now "Tiger" would seem to convey the impression, "Well, he is a very rough fellow, or ferocious or very fierce". That name "Tiger" was used during the testimony, if you recall, especially when Yellin, Spielfogel and Kovner were testifying; 3434
but if you will recall, he received that sobriquet in a very innocent way. He liked the song "Tiger Rag" and he used to ask for it, and he asked for it so often that his friends called him "Tiger". They might just as well have called him "Tiger Rag" or "Little Annie Rooney", if it was that song; so do not be carried away by the sobriquet of "Tiger".

On page 128 of the record, Yellin still testified:

"Q. Can you tell us about when it was, approximately, when it was" (that he met him)?
"A. It was the early part of the week before 3435
the 15th, about, I would say, on Tuesday or Wednesday"; keeping in mind that Saturday was the 15th, Monday would be the 10th, therefore Tuesday or Wednesday of that week would be the 11th or 12th. The following question:

"Q. At what place did you meet him? A. In front of an Auto Rental Store on First Street between Avenue A and First Street."

That is the record. He probably meant First Avenue; I don't know.

"Q. Would that be in New York County? A. Yes.

"Q. Was anybody there at the time that you met Indovino? A. Yes; I was introduced to him by Ebbie."

That is Beitler who, if you recall, Indovino denies knowing at all. He was shown his photograph and he said he never knew that man; but he heard the name Ebbie up in Elmira Reformatory but he never knew that was the Beitler
3437 referred to in this case until he was told.

"Q. By Ebbie Beitler you mean? A. Ebbie Beitler, yes.

"Q. When Beitler introduced you to Indovino, what did he say?"

And then there was a long line of objections made but finally the questioning was resumed on page 129:

"Q. I asked what did Beitler say when he was introducing you to Indovino? A. He said, 'Joe Tiger, Davie Yellin, a friend of Slip's.'

"Q. Who is Slip, please? A. Slip is Nathan Spielfogel."

3438 Then at the bottom of page 129:

"Q. Now, Mr. Yellin, at that time and at that place, in the presence of Beitler, did Indovino have a conversation with you? A. Yes.

"Q. Will you tell the Court what he said, please, and what, if anything, you said to him at that time?"

On page 130, after some objections were made is the answer:

"A. He called me as I was walking by, and I walked over to him."

At the bottom of page 130:

"A. Ebbie called me as I was walking by, and I walked over to Ebbie, and he introduced me to Joe Tiger, saying, 'Joe Tiger, Davie Yellin, a friend of Slip's.' Then he told me, he says, 'This fellow has got something good out in Coney Island.'"

That is what Beitler said. Continuing:

"I asked him—he asked me—he told me he wanted me to deliver this message to Slip, and he started to tell me about—then Joe Tiger chimed in, and he told me, he started explaining 3440
the trick to me and he told me it was—"

And then there was a pause there—and he resumed at the bottom of page 131:

"Indovino started explaining the details of the job out in Coney Island. He told me that it was the manager of a bank who takes the day's receipts to the bank, a few blocks away. He said the neighborhood was as dead as Kelsey's Nuts. He says it is a cinch job.

"By the Court:

"Q. Did he say it was the manager of a 3441
bank? A. Manager of a theater. He says the neighborhood was dead, and it would be a cinch job. He told me that the money was escorted by a policeman who walked with him, but they did not have to worry about the policeman, because he was not looking to get killed, he would give up as fast as anybody. He gave a few more details—"

And at the bottom of page 132, finishing up Yellin's testimony with respect to what Indovino told him:

"A. (continued)—that he said the money left

at about 11 o'clock, left the theater about 11 o'clock. He told them just where to park the car. I don't know Coney Island very well, so I cannot tell you just the street he wanted to park the car on. And then we got through with that conversation. 'Ebbie told me, he said, 'When you see Slip tonight, tell him I want him to go on the thing with me, and tell him what it is all about.' "

That is Yellin's testimony if you recall. He
3443 does not mention the name of the theater in that conversation with Indovino. Loew's Theater is not mentioned in that but if you recall, and I will point it out to you that when Spielfogel testified, he brought in the theater, the name of the theater, Loew's Theater, though there is no such testimony from Yellin in his conversation with Indovino, simply the manager of the theater.

Well, what happened after that? Yellin said that obedient to the instruction that was given to him by Beitler, he met Spielfogel and he told
3444 him all about it. Spielfogel said, "No, I won't have anything to do with that Ginny, or some words to that effect. I don't want any part of it. In effect, you have delivered the message and I have heard it but I am out."

And then Spielfogel testified, Spielfogel adds nothing whatever to the story because he simply rehashed what Yellin told him, but we already have that from Yellin so there is nothing added that means anything on the part of Spielfogel.

Well, what is the District Attorney's position then? He scratched his head a little bit and thinks it over and says, "Well, if that is all we

have got, we have got to turn Indovino out. We haven't a case against him. Yellin is an accomplice. Yellin put himself in this picture to proceed a little further then from where he was in the conversation that took place between Beitler and Indovino himself, he went further; he carried the message from two of the alleged conspirators to one whom they wanted with them on this job in Coney Island, so the District Attorney says, "I am sunk if that is all I have." Where do they go then, back to Sing 3446
Sing Prison again. Back to the employment agency up there to pick somebody else. And whom do they bring down? That contemptible creature that you saw on the stand here, Kovner. The fellow who was sentenced out of this Court by his Honor presiding at this trial, sentenced for a robbery and is serving in Sing Sing Prison, serving a term of 15 to 30 years. That is the fellow they bring down to supply the missing link.

And gentlemen, I could stop now in my summation and say there is the only witness, the 3447
only witness against Indovino in this case, Kovner. Pick out another one, if you can. Let Mr. McGough pick him out when he sums up to you. I defy him to pick out from that record one other witness who has testified, and whose testimony you will have to consider, and I ask you to listen carefully to his Honor when he instructs you that the only witness whose testimony you can consider in connection with the guilt or innocence of Indovino is that miserable rat Kovner. Think it over and see whether I am right or not.

How would you gentlemen like to be sitting in the chair that Indovino occupies, any one of you, and have your life hanging in the balance, depending upon a witness like Kovner? What would you think of yourselves if you accepted his testimony with a human life at stake? I should not care to be sitting in that chair and have Kovner's testimony accepted. That is what you gentlemen have to do. That is all there is to this case as far as Indovino is
3449 concerned.

These witnesses that I have told you about, a long list of them, as far as Indovino is concerned, we could concede their testimony. It does not mean anything as far as his guilt is concerned. The only witness in this entire record is Kovner.

Well, the next witness that testified was Louis Sonnenblick. He said he never saw Rudish, and that means nothing as far as Indovino is concerned.

Nathan Spielfogel; I have already referred
3450 to him. He is the one doing 30 to 60 years. He rehashes the story of Yellin, so he adds nothing to the picture.

Then we have the witness Eisler. He was the fellow that picked up the package, and his testimony has no reference to Indovino whatever, so I can pass him by.

Peter Shamin was the boy that was called last week and recalled yesterday. I will leave his testimony with you. It has nothing to do with Indovino.

Virginia Goonan testified that she was introduced to Indovino by Malinsky. The purpose

of that testimony was to show that Malinsky knew Indovino. We never at any time denied it. You will recall in my opening, I said that Malinsky and Indovino knew each other from Elmira but were not friends. He never knew his last name. He was known under the name of "Jew Boy"; he knew him when he saw him, so there was nothing to that testimony as far as the introduction is concerned because we concede that they know each other. We do not concede her testimony, however, that she was 3452
introduced to Indovino by Malinsky. We do not concede that. We deny that because you remember when on the stand he said that he never saw Malinsky from the time he came out of Elmira, that part we deny, but the fact that they know each other, of course, we concede. I did not cross-examine Virginia Goonan at all, if you recall.

Pietro Di Pisa, the brother-in-law of Malinsky, his testimony had no reference whatever to Indovino, and if you recall I did not cross-examine him either. There was no 3453
necessity for that.

Then Frank Maguire, the stenographer from the District Attorney's Office, an able conscientious and efficient stenographer, was called as a witness. I do not doubt the accuracy of any notes that he may have made. It was my privilege to appoint him in the District Attorney's office, and I know his work, so I shall not question the statement, but it has no reference to us as far as Indovino is concerned, there is no such thing as a statement.

And then Charles Celano, the detective, testi-

3454 fied about taking Malinsky to the Property Clerk's office, where as he says, a car was identified. That has no reference whatever to Indovino.

Then Lieutenant James McNally was recalled for some cross-examination, and I did not cross-examine him on the part of Indovino, and then finally we come to that high-class character, Samuel Kovner.

Before I take up Kovner's testimony, gentle-
3455 men, may I recall to you in Yellin's testimony, page 130 to 131, the testimony that Yellin gave us that Beitler said, "This fellow has something good out in Coney Island. On page 132, he said it was the manager of a theater, but he did not mention the theater and then Yellin said that Indovino told him there would be about $1,000 for that night. That was Yellin's testimony. Spielfogel testified that in his conversation with Yellin, which took place in that candy store over at 7th Street and Avenue D in Manhattan, at page 203 of the record, Spielfogel said it was
3456 supposed to be at Loew's Coney Island. A little more added to the story. At page 203 he also said, that is Spielfogel, "He told me it was a rookie cop walking with a—with a paymaster from the Loew's."

Now in Kovner's testimony, on page 612, if you want to consult the record, Mr. McGough, Kovner said that Indovino told him that he had a piece of work in Coney Island, a payroll for $2,500. I call this specifically to your attention at this time, gentlemen, to show you the discrepancies. These fellows may sit down and talk it over and each one hears the other's story,

and then he comes in and tells you something as if it came from him originally, where as a matter of fact he is only telling you what somebody else told him. But here you have discrepancies that they are commingling with one another, and that Indovino told Yellin $1,000, and then told Kovner that the amount of the take would be $2,500.

Now Kovner testified that he knew Indovino for about three years. If you remember, Indovino told you from that stand that the first time 3458
he ever saw Kovner was when he sat on that witness chair. That is a question of fact, gentlemen, between Indovino and Kovner. Whose word are you going to accept on it? Yes, this young man Indovino, he made a mistake. He pleaded guilty to attempted robbery in the third degree and served his time, ninteen months in Elmira. He has a mark on him, but if you recall, from the time he came out, from his story there, he has a steady record of work and has behaved himself; lived decently, married decently and living with his wife and child up to 3459
the time of his arrest.

Let us suppose even you would say, "Well, both of them have marks on them. We cannot believe one more than the other."

In that case, then, you would have to give the benefit of the doubt to Indovino. You would have to do that under the law, even with the mark against him, and I would ask you from their conduct on that stand and from your observation of them, which one would you believe? Whose word would you accept? The mere fact that he made that mistake once does not pre-

vent him from telling the truth. It would not prevent these other fellows from telling the truth, were it not for the fact that they have a very ulterior motive. Oh, they may say they do not expect any consideration, do not expect any lessening of their term; they would go out and stick up people with guns and they would be potential murderers but they would not stoop so low as to tell a lie on the stand even though they thought that lie under oath would be of
3461 assistance to their predicament in which they find themselves in at the present time. And if you recall, gentlemen they did not tell any of their stories to the authorities until after they were sent up for those long terms to prison, and then they began to tell stories. Think that over in your jury room and ask yourselves if they have any motive.

Now we have a conversation between Yellin, Indovino and Beitler. I told you then the District Attorney scratched his head a little bit and said, "We need more". Then he says, "Now
3462 we must tie Indovino up in some way with Malinsky. How can we do that?" That is when Mr. Kovner comes on the scene and Mr. Kovner testifies at page 598 and 599 as follows: At page 598:

"Q. Now who was with Kovner at the time you saw Indovino and Malinsky at that place?"

Now they have got him with Malinsky.

"A. I did not hear the question.

"Q. Can you hear me at all? A. Now I can hear you.

"Q. Who was with you when you saw Malin-

sky and Indovino at that time and place? A. Ebbie was with me."

So now you see we have four. We have Malinsky; we have Indovino, Beitler and Mr. Kovner.

"Q. What, if anything, did you hear Tiger Indovino say?"

Then there were some objections made, and on the top of page 599, we have this question and this answer:

"Q. Now we are ready for the conversation. Tell us what was said, if anything. A. Tiger came down to speak to Ebbie; Tiger and Malinsky. Tiger said he had a piece of work and if Ebbie wanted to go on it; if Ebbie and I wanted to go on it, so Ebbie asked what the piece of work was. Tiger said it was a payroll in Coney Island. He said, 'A cop goes with the payroll but he will give up if you put a pistol to his back.'

"Q. Who said that? A. Tiger.

"Q. Did you hear that? A. Yes, sir.

"Q. Whom did he say it to? A. He said it to me and Ebbie.

"Q. What else was said, and tell us who said it. A. After I pulled Ebbie on the side, I spoke to Ebbie privately.' "

Now what was that conversation, gentlemen? Here is the answer to it on page 597:

"Q. And where did you see them, Kovner?", them of course meaning Indovino and Malinsky. "A. I seen them on Attorney and Broome, about five days before the 15th."

Well, five days before the 15th, according to my mathematics, is February 10th. Why, that

is just about the time that Yellin was supposed to have had a conversation with him. And here we have a repetition by Kovner of the so-called tip that Indovino was giving to Beitler, when Yellin already testified that that same conversation went on as between Beitler, Indovino and himself. Well, which is it? Are these two separate conversations? Or did they become a little bit mixed up on this thing? Or is the other theory correct, the one that I first advanced, that
3467 is that Yellin had the first conversation, and realizing that they did not have enough, that Indovino will have to go out, that they then brought Mr. Kovner to supply the missing link. Take your choice on it, gentlemen. But certainly in the conversation between Beitler and Indovino and Yellin, Kovner's name was never mentioned, and in the conversation between Kovner and Beitler and Malinsky and Indovino, Yellin's name was never mentioned. Keep that in mind, gentlemen, as you go out.

Now I do not know that I have to stand here
3468 analyzing this testimony any more, gentlemen. Long summations sometimes are very confusing. There is no necessity for a lengthy summation when your point is very simple. I do not have to discuss all that testimony back and forth, with reference to Malinsky and Rudish. I am confining myself solely to the testimony on the record with reference to Indovino and you can sum it all up in about three or four pages, and one witness, Mr. Kovner.

Well, at any time what was Indovino doing? I am referring to the time which dates from his release from Elmira up to the date of his ar-

rest. He says that it was his custom to go to his fiancee's home every night, arriving there about six o'clock, have his evening meal with her, from about the fall of 1940 up to and including the date of his marriage, and from the date of his marriage right up until the day of his arrest; that he went directly from the place of business, from his place of employment at the Star Shoulder Pad Company to his fiancee's home. Is there anything surprising about that, gentlemen? Remember, Indovino is on parole and that is a very serious thing. Any man who has been in prison, I have been there officially and that is bad enough, but any man that has been in our prisons, I do not care how sanitary they may be; how beautiful they may be in construction as you gaze upon them from the outside, anybody who has served a term in prison, if he has any decency in him at all, any character, does not want to return.

Now, this man was released at the end of nineteen months. He took the lowest form of plea that we have in a robbery case, attempted robbery in the third degree, and that was granted him by the Court. He served nineteen months. He made up his mind when he was released from prison and placed on parole that he was going to go straight, get a job, keep the job and marry and settle down. He engaged in gainful employment and led a decent life, and let the dead past bury its dead; and he lived that way.

There is nothing surprising that he took that evening meal there every night. Do you think that he would go down in the lower East Side where these hoodlums congregate and where

they make their plans for robberies, and be found in their presence? Why, that alone would be enough to send him back as a parole violator, so he behaved himself.

Where was he on the night of this robbery? The District Attorney concedes of course that he was not at the scene but I had a reason for putting that testimony in there, gentlemen. I wanted to show you just what he was doing and where he was; what his state of mind must have
3473 been because of his actions at the time that this robbery was committed and thereafter. If he was the tipster in this case, would he be sitting over at his fiancee's home, from six o'clock in the evening until half past one in the morning, and then go serenely on his way to his home, sleeping there that night, conscious of the fact that at eleven o'clock that night a robbery had been committed in accordance with plans that they say were made?

Would he, the next day, when he read about the patrolman who was killed in that robbery, if he had anything to do with it, act as he did, go
3474 again to his fiancee's home, and attend a wedding over there at Our Lady of Grace Church, the wedding referred to in the testimony of Mrs. Indovino?

Would he the next day go to his work, remaining in the City right along up until the date of his arrest with a single exception of the two weeks when he went to Baltimore again in the performance of his duties with the Lacomastic Corporation?

That is what you gentlemen must consider as plain common sense men. You do not have to

throw your common sense out the courtroom window the moment you become jurors, and I know you won't. That is why I am glad we have a Special Panel. When you meet men in your everyday affairs and you talk to them, you listen to them, you make up your mind whether they are trying to deceive you or whether they are trying to take you over or not. There is a certain standard and a certain norm that you employ in your everyday business affairs by which you determine whether or not men are 3476
telling you the truth or men are deceiving you. Bring that same experience right into the jury box, and I know you will.

When the District Attorney sums up, I cannot answer him. I am finished when I have concluded my summation, but I want you gentlemen to remember what I have said as an answer to what he may advance because I cannot as I said to you answer him back. I can hear him now, as he stands looking at you and says, "What does Mr. Geoghan want in the way of testimony? Did he expect us to bring college 3477
professors here from Seminaries, men studying for the ministry, bankers, lawyers or physicians? Why, no, this fellow Indovino", he will say, "does not associate with men of that kind. We can bring only the men that know him and that know about this case."

Why criticise this fellow. Listen to that argument. There is some truth to that but it does not follow that when they get on that stand they are telling the truth. That is the point. The purpose of this trial is to discover where the truth lies, and I cannot impress upon you any

too emphatically that your task is going to be very simple when you come to Indovino's case, and you are going to consider each one of them separately, and that will be as one juror may say to another, as far as Indovino is concerned, "Kovner is the only man we have to consider. Are we going to send him to his death on the word of that rat?"

What is your answer going to be to that, gentlemen?

3479 I leave this case with you confident that you are not going to be confused by the mass of testimony. I am confident that no one of you will say, "Well, what is the use of considering each one and to see what applies to this one and to that one and the other one? Let us put the all in the one boat and let it go at that."

You were not going to do that, gentlemen. I know you are not. I am confident that you are going to consider each defendant separately. You are going to ask yourselves, "What is the testimony as against that particular defendant?"

3480 As to Indovino, I say you cannot answer it in any other way except by the 15-to-30 boy that came down from Sing Sing Prison, and he was the link that is supposed to tie up Indovino, because without him there would be nothing even to give to you for your consideration.

And so gentlemen, I am not going to appeal to you to be fair and just. I know you are going to be. It would be a superfluity on my part to even suggest that to you. This case is important. It is the most serious crime known in the law, murder, and the murder of a police officer is a terrible crime. It is important to the people

of the State of New York and it is just as important to Indovino, this defendant, as he sits there, waiting for your return.

You saw his little wife on the stand; decent, respectable, and refined cultured little lady. You saw her mother. You saw his sister. They are not the type of people that have in their homes a gunman, I mean one who is engaged in that business day after day, as these three fellows told you they were, out on stickups. They are decent respectable people. 3482

Send him back, gentlemen, to that little wife and to that home, and let him resume his work where he was steadily employed. Let him prove to himself as he has been trying to prove all along that he had not lost all his manhood and all his character; that despite the mistake that he had made, he is going to come back and show his people that he is still a man. If anybody in this courtroom, any of the counsel, or the jurors, ask of themselves this question, "Let him who is without sin cast the first stone." Who can pick it up? I could not and probably none 3483 of you gentlemen could either. Well, we have all made mistakes. He made his. But from the day he came out until the day he was arrested and charged with this heinous crime, he was a steady workman, acted decently, and was in the society of decent people.

Do not send him back, gentlemen, not to Elmira, nor up to the death house in Sing Sing Prison. I don't know how your consciences could square themselves with that determination of this case because you would have to say to yourselves, when you look in the mirror, after

you go home and your deliberations are over and your verdict has been rendered, look into that mirror and say to the fellow that looks out, "I don't know how I could have done that and that is why I didn't do it. I could not send a man up to the death house in Sing Sing Prison on the word of a confessed highwayman and potential murderer, Kovner."

Gentlemen, bring in the only verdict that common sense and the evidence dictates in this case
3485 as far as Indovino is concerned, and I know you will do it when you return and your Foreman will stand and representing you, will answer the question that the Clerk puts to him: "Gentlemen, how say you, do you find Indovino guilty or not guilty?" He will say in a loud voice so that it would not be misunderstood, as reflecting your collective judgment, as to Indovino, on the evidence, "Not Guilty".

Thank you for your patience, gentlemen.

The Court: Gentlemen, I think we can take a five-minute recess before we will listen to the
3486 address of Mr. Carabba on behalf of the defendant Rudish. Do not discuss the case and keep your minds open.

(Whereupon a short recess was taken after which the trial was resumed).

(Mr. Carabba made a closing statement on behalf of the defendant Rudish, as follows):

Mr. Carabba: If it please your Honor.

The Court: Mr. Carabba.

Mr. Carabba: Mr. Foreman and Gentlemen of the jury: It becomes my duty at this time to rise and speak on behalf of the defendant Rudish. Perhaps you men know that I have

been assigned by this Court with my colleagues, Assemblyman Fred G. Morritt and Mr. Meadow, to defend the defendant Rudish on this charge; I, like my colleague Mr. Geoghan, who was also assigned by this Court.

I want to read to you the indictment that has been presented by the Grand Jury of this County as against all of the defendants. The Grand Jury of this County by this indictment accuse the defendants (that is all three) of the crime of murder in the first degree committed as fol- 3488
lows: The defendants on or about February 15, 1941, in the County of Kings, acting in concert with Abraham Beitler, deceased, wilfully, feloniously and of malice aforethought shot and killed Leon Fox with a pistol." That is the foundation of this criminal proceeding

In answer to that charge, that accusation, the defendant Rudish says by his plea of not guilty, "I did not commit the crime charged against me in that indictment."

The District Attorney is compelled by law under our system of criminal procedure in this 3489
case to state to the Court and to the jury in his opening what he intends to prove against these defendants concerning Leon Fox. The duty imposed on him by law is to prove all the material allegations contained in this indictment as against all of the defendants.

Now I want you to keep in mind that I am speaking only for and on behalf of the defendant Rudish. In the District Attorney's opening to you, he said, and if I may be permitted to quote from the official record, I am now reading from page 10:

3490 "I intend to"—this is Mr. McGough speaking—"to offer testimony here that Rudish was driving that car—Rudish was the driver, Beitler was in the front seat, and the defendant Malinsky was in the back seat. Three of them visited the scene and perpetrated this offense, and Indovino was the tipster."

Further down on page 10 concerning my client, Mr. Rudish, Mr. McGough said, "that there was a conceived, planned conspiracy be-
3491 tween these defendants right here on trial and the dead man Beitler, that they were to go at nine o'clock that night, that Rudish was to supply the car, that Beitler was to supply the guns, two .38 and two .45 calibre guns; and that Malinsky was to go along.

"I intend to show that this automobile was taken from the corner of Pine and Fulton Streets by Rudish, when he went out to find Sonnenblick and could not find him, and when he found that time was running against him, and he was in danger of being late for the ap-
3492 pointment in the lower East Side of Manhattan, and he took this Ford 1936, blue, convertible coupe automobile, with a cloth top."

Now I say to you gentlemen that the theory of the prosecution in this case is that there was a criminal conspiracy or understanding between these three defendants and one Abraham Beitler, now deceased, to hold up and rob an employee of Loew's Theater at Coney Island on his way to make a night deposit at a bank located on Surf Avenue and 12th Street.

Now we have in the indictment, and the indictment specifically charges that these three

men on February 15, 1941, acting in concert with Abraham Beitler, feloniously shot and killed Leon Fox. They acted in concert to kill Fox that evening. The theory of the prosecution in its opening is to the effect that these men conspired or had an understanding to go on the evening of February 15, 1941, or prior thereto, not to kill Fox, but to hold up an employee of Loew's Theater at Coney Island. Now which was it? That on February 15, 1941, they were to kill Fox? There is no evidence in this 3494
record here submitted by the prosecution that any of these defendants knew Fox on February 15, 1941, or prior to that time, so I say that there is a variance between what the indictment alleges and what the prosecution said in its opening it would prove.

Mr. McGough said that he would prove that this was a preconceived plan and understanding between these three men and one Beitler, now deceased, to commit a robbery down at Coney Island, not to kill Fox as the indictment says.

The Court: Mr. Carabba, may the Court 3495
respectfully interrupt at this point?

Mr. Carabba: Yes, your Honor.

The Court: Without any intention to be rude to counsel. I am going to charge this jury that under this form of the indictment, the District Attorney is absolutely within his rights to establish a felony murder. That is the law.

Mr. Carabba: That is right.

The Court: I am going to charge it to them in language so simple and clear that they will understand it. Is that clear, Mr. Carabba?

3496 *Summation on Behalf of Defendant Rudish*

Mr. Carabba: I am going to follow it right up now.

The Court: In other words, the indictment is proper in this form as read to this jury.

Mr. Carabba: I disagree with your Honor.

The Court: All right; the jury will follow my instructions.

Mr. Carabba: Your Honor—

The Court: —my instructions of the law, not Mr. Carabba's. You gentlemen understand that,
3497 don't you?

Mr. Carabba: I do not intend to—

The Court: Desist from further argument along this line, because you are in error as to the law. There is no question about it.

Mr. Carabba (continuing his summation): Well, what is the evidence in this case with reference to Rudish and Indovino, and all of these defendants. Is there any evidence in this case submitted on behalf of the prosecution that Rudish knew Indovino on the evening of February 15, 1941? There is not any. Not one human
3498 being has taken the witness-stand in this courtroom to satisfy you that Indovino and Rudish knew each other prior to October 24, 1942, and that was the day of the arrest of Rudish and Indovino.

Well, if they did not know each other prior to October 22, 1942, then Rudish and Indovino could have not met on February 15, 1941, and planned and acted in concert to kill Fox. There is a simple issue here.

You know that from the time that Rudish was arrested, I think he said it was October 24, 1942,

he told the prosecution and he told the police that he never knew Indovino until he was arrested, and Indovino said likewise concerning Rudish, that he never knew Rudish prior to the date of his arrest, October 24, 1942. Where is the evidence in this case that Rudish, on the evening of February 15th, stole a car and drove this car to New York, and picked up Beitler and Malinsky? Where is there evidence on the part of the prosecution that Rudish was at the scene where the robbery was committed on the even- 3500
ing of February 15, 1941?

The prosecution has failed to offer any such proof, and in the opening of the District Attorney, after saying all that I have read to you, and I quote now from page 7, Mr. McGough said:

"Gentlemen, I want to make a very frank statement at this time. The People in this case do not have any eye-witnesses who were at this particular spot; but I intend to offer complete and detailed evidence which at the proper time will convince you of the guilt of each and every 3501
one of these three men."

I have the right to anticipate and believe that his Honor will charge you that the witness Yellin is an accomplice. All that Mr. McGough offers to substantiate the material allegations in this indictment, and to substantiate what he said to you in his opening, are just two witnesses; the witness Yellin and the witness Spielfogel. These two convicts, who were convicted in New York County, I believe in the same holdup both were involved, tell you on this witness-stand that they had information prior to February 15, 1941,

3502 prior to the killing of Fox, that a robbery was going to take place at Coney Island. They had information, they say, as to what happened, what occurred on the evening of February 15, 1941; way back in February 1941, and at no time did either of them tell any enforcement agency, District Attorney or police, anything about the commission of that crime until October of 1942. They kept that information to themselves for a period of twenty months. As
3503 you know, this has been an unsolved murder up until the police made an arrest in October of 1942. For twenty months, in this case, the police made no arrests.

Now you have two men, as I said before, Yellin and Spielfogel; the two men who testified here, giving all the details that they say that the defendants said, that the defendant Rudish said as to his part in the alleged crime. You have no other witness here that has been put on the stand by Mr. McGough.

Now if his Honor charges you as a matter
3504 of law that Yellin is an accomplice, the District Attorney must go one step further. He must offer proof, outside of Mr. Yellin's testimony, to connect my client, Mr. Rudish, with the commission of this crime. You have nobody else except the word, the alleged admissions, alleged to have been made by Rudish to Yellin and Spielfogel.

I am satisfied that in the interests of justice, the Learned Jurist who presides here, when he charges you, will give you the evidence as against each and every defendant, so that you may concern yourselves when you go into the jury room and discuss the guilt or innocence

of my client, you will have before you, and I believe his Honor will do it, read to you the evidence that Yellin and Spielfogel gave on that witness-stand.

There was a very feeble attempt on the part of the prosecution to connect Rudish and Indovino. They called, I do not recall that man's name, but I think he was the candy store proprietor on the East Side, and I think he said, after he walked down and put his hand on Rudish and on Malinsky, that he knew Indovino, 3506
or that Indovino was in his store with Rudish and Malinsky. Then on cross-examination he said he was mistaken; he might be mistaken as to the identity of Indovino. Now I say to you it is very important in this case, important to my client, for the District Attorney to prove in this case that Indovino and Rudish knew each other on February 15, 1941, and prior thereto.

Now since October 1942, since the arrest of the defendant Rudish, as he has testified here on the stand, he has always maintained that he never knew Indovino and that Indovino never knew 3507
him; since October 1942, the first time he met him was when he was arrested. Now during all that time from October 1942 down to the present time, the prosecutor, here, with all the force he has at his command, detectives, investigators, has he brought anyone here and put him on the stand to satisfy you that Rudish and Indovino knew each other prior to October 22, 1942? The defendant Rudish said, "I never met this man until I was arrested." He told that to the police and told that to the District Attorney. The prosecutor has

had nine months' time to rebut that testimony, to bring proof here that these two men knew each other, knew each other on February 15, and conspired with each other, acted in concert with each other to shoot and kill Fox on February 15, 1941.

Now if in the course of my summation, gentlemen, I should inadvertently quote any evidence here that does not meet with your recollection as to what was said here on the stand, I want to assure you it is your recollection that counts and
3509 not mine, and I want to assure you that if it differs with what you recall the evidence to be, I do it inadvertently and not with any purpose to mislead you.

Now am I right when I say that all there is in this case in so far as the defendant Rudish is concerned; that all you have here to digest and to go over in order to connect Rudish with this crime, is the testimony of Yellin and Spielfogel? Why, the District Attorney agrees with me on that, that that is all he has in this case.

I read from page 638—I think the Court said
3510 on page 638 the only testimony in this case that concerns Rudish is the testimony of Yellin and Spielfogel:

"The Court: Is there anything else in the record?

"Mr. McGough: I think your Honor is right. I think that is substantially correct; Yellin and Spielfogel, and that testimony with reference—to that of Lieutenant McNally at the Bossert Hotel."

Mr. Carabba: That is all you have in this case; two convicts, who had knowledge, who were possessed of information that a felony was going to be committed two or three or four days before

February 15, 1941, before that date of its commission, and kept that information unto themselves, never revealed it to any police authority or law-enforcement agent until October of 1942.

I say there is no evidence here that even Beitler was on the scene of this crime; no proof that Rudish was on the scene; no proof that Malinsky was on the scene except the statements alleged to have been made by Yellin and Spielfogel: statements that the defendant Rudish said, "I was there. I did this. I did so-and-so." That is not 3511 enough, gentlemen.

Suppose I walked into a station house and I told the officer at the desk, "I committed the crime of murder. I just killed a man." Well, he would say to me, "Sit down," and he would verify what I said, make an investigation, and in addition to the statement that I said I committed a crime and killed a man, they would have to submit and get other proof besides your own admission that you actually committed a crime.

The Court: Well, Gentlemen of the jury, I will charge you on the law as to that. Do not fol- 3511 low Mr. Carabba's statement of the law. You will take mine. He is not altogether correct in what he said.

Mr. Carabba: Well, I say to you gentlemen that on the evidence adduced here by the prosecution, they have failed to prove the material allegations contained in this indictment, and that is fatal. The missing link here is the failure on the part of the prosecution to prove that Rudish and Indovino knew each other prior to October 22, 1942. There is no evidence in this entire rec-

ord that they had ever met, conferred together or talked to each other, or knew each other or had seen each other, or went out together; no such evidence in the record. If they did not know each other, gentlemen, prior to 1942, and there is no proof here that they did, then they could not have committed the crime as alleged in this indictment.

I am not going to talk about Yellin or tell you what I think of him or about Spielfogel. I think his Honor, when one of the witnesses was on the
3515 stand, he admitted that he was a gunman, a robber, and so did the others.

Place yourself in the position of my client Rudish, charged with the highest crime known under the laws of this State, murder in the first degree; and all that you have against him, I repeat again, is the alleged confession that he, Rudish, is supposed to have made to Yellin and Spielfogel. That is all there is in this case, and if you find, gentlemen, and believe from the evidence in this case,—I think Indovino, my recollection is that he also testified when he took the stand,—my col-
3516 league Mr. Geoghan did not bring that out, but Indovino testified under oath that he never knew Rudish prior to the time of his arrest.

I am going to ask you, gentlemen, when you go into your jury room to deliberate on the innocence or guilt of my client Mr. Rudish, that you listen carefully and attentively, and I know that you will, to the charge that his Honor will give you in this case concerning each and every defendant.

I personally believe that from the testimony of Spielfogel that he himself is an accomplice, and if I may be permitted, I think when I was cross-examining him on the witness-stand, although he

subsequently, I believe, changed his testimony—at the bottom of page 329, the witness Spielfogel being cross-examined by me, stated as follows:

"Q. Didn't you say you would have to talk to Moish so that Moish would give Beitler the guns; is that correct? A. Yes."

Subsequently he changed that, later on. I said that Spielfogel, who went into all details here as to the commission of this crime, that he likewise is an accomplice. I don't know what Judge Leibowitz will do with reference to him, but I say 3518
that from the evidence adduced here, you have the right to draw such inferences from the testimony of Spielfogel to say among yourselves as to whether or not he was not also an accomplice.

My time is drawing near, gentlemen, for the period of time that has been allotted to me—

The Court: You have another half hour, Mr. Carabba. You can have more time than that if you want to.

Mr. Carabba: I understand that we were to take a recess between twelve and one.

The Court: You have another half hour and 3519
I will give you another hour if you wish it. Do not hurry yourself at all. The case is important enough for counsel to have all the opportunity he wants to advance every argument that he has to the jury. Time means nothing when a man is on trial for his life.

Mr. Carabba: All right, Judge Leibowitz.

The Court: Go right ahead and take all the time you want to.

Mr. Carabba: Thank you.

The Court: Proceed.

Mr. Carabba: I am not here to pass upon or

even to criticise the conduct and the deportment of the police officers in this case. You will recall that when the witness, the defendant Rudish, took the stand, he said that from the time of his arrest he told the detectives and the District Atorney that he knew nothing about this crime. You will have to say to yourselves, "Was this Room 608 in the Hotel Bossert, a station house?"

"No." "Was it the office of the District Attorney?" "No." "Was it a Magistrate's Court?"
3521 "No." It was a room used and occupied by the police, to bring whoever they suspected of having anything to do with this crime, where they could work out the process of giving a man a workout. That is all it is. A reputable hotel in this County used by the police to question and question and question for hours those that were accused of crime. I find no fault with that. I find no fault with the police using every honest effort to bring to justice those who have committed this cowardly crime of killing Leon Fox, whom I have had the pleasure of knowing and knew personally. He
3522 was no rookie cop. He had been on the force 13 years.

Now statements were made by my client Rudish there from the very first time that he was arrested, and I don't know whether they were taken down or not; but I say to you again, from October 1942, the statements of Indovino and the statements of Rudish, in so far as each other is concerned, the prosecution has not been able to rebut, and that is that they know each other.

I am quite sure that you will take into consideration when you go into your jury room and you consider the guilt or innocence of my client, all

the evidence that has been adduced here by the prosecution, that you will apply the law as his Honor will charge you that applies to my client, the defendant Rudish; and if you do that, gentlemen, you cannot come to any other conclusion but say on your oaths and on your conscience that the evidence in this case fails to connect Rudish and Indovino prior to October 1942. If you are satisfied that the evidence in this case fails to show, by competent, credible, legal evidence that these men knew each other, I am speaking of Rudish and 3524
Indovino, then this crime, alleged in the indictment, was not committed by Rudish or Indovino.

I need not tell you of the seriousness of the charge here and what it means to my client. Yes, he knew Beitler. When this boy Rudish was a boy in his teens, he went to Hawthorne, and I think the evidence here is that Beitler at one time was in Hawthorne when he was a boy. Hawthorne is a place where I believe and I think his Honor will charge you, where boys are charged with juvenile delinquency are kept. That is the only connection there is in this case in so far as 3525
Beitler and Rudish are concerned, that he was up there at the same time. My man Rudish in his younger days committed some infraction of the law, no felonies, misdemeanors; and he lived on the East Side there, and he was punished for what he did; and subsequently he moved out of that locality on the East Side and married and came to Brooklyn; and is living with his wife and three children.

At the time of his arrest he was employed and was employed for some time prior thereto, so I say that his conduct and deportment since he has

been married and since he has been out of there, I think he said he went to the Penitentiary and served three months, and from that time, I do not recall the date, up until the time he was arrested in this case, he was leading a clean life with his wife and children.

I am going to conclude, gentlemen. You understand that when I sit down I have no further opportunity to arise and answer Mr. McGough, and when his time comes to address you, I cannot
3527 answer him, but I will ask you to bear in mind and keep in mind the evidence and only the evidence that was adduced on this witness-stand in so far as it concerns my client, and if your recollection of the evidence in this case in so far as my client is concerned is different than what Mr. McGough may say to you in his summation, it is your recollection that counts, not mine, not Mr. McGough's, and not even the Judge's, for that matter. Keep that in mind because there may be and I have no right to anticipate, that he may quote some part of Yellin's evidence and Spiel-
3528 fogel's evidence, and I have no right to get up and answer him after he is through.

In closing, gentlemen, I am going to leave this case with you with the thought in mind that I know and I believe that you will do justice not only to my client but to the People of the State of New York. My client, on this evidence that has been adduced here, is entitled to a verdict of not guilty of the crime charged in the indictment, and I thank you for the consideration and the attention that you have given me during my summation.

The Court: Gentlemen of the jury, we are now

about to take a recess for luncheon, I admonish you at this time not to discuss the case among yourselves or with any other person, or permit any person to speak to you about this case and discuss it in your presence. You must keep your minds open and do not form or express any opinion or conclusion as to the guilt or innocence of the defendants on trial or either of them or any of them until the case has been submitted to you for your consideration and the charge by the Court. You may retire now and return promptly 3530
at fifteen minutes past one.

(Recess)

After Recess—Trial Resumed

(Mr. Solovei made a closing statement on behalf of the defendant Malinsky, as follows):

Mr. Solovei: If it please your Honor.

The Court: Mr. Solovei.

Mr. Solovei: Mr. Foreman and Gentlemen of 3531
the jury, Counsel for the Defense: At the outset I want to take this opportunity of thanking you gentlemen of the jury for giving your undivided attention to this important case during these tough days with this heat, and I know that you made great sacrifices to be here, but of course it is part of our duties to be here and we had to be here for the purpose of disposing of the case where a man is charged with such a serious crime as murder in the first degree.

Now gentlemen, you have heard Mr. Geoghan.

3532 *Summation on Behalf of Defendant Malinsky*

You have heard Mr. Carabba. They appeared for the two other defendants. I appear for the defendant Malinsky.

Now during the course of this trial there has been quite some heated discussion during the course of the trial between counsel, the Court and the District Attorney, and whatever happened of course should not have the slightest weight or bearing upon your minds during your discussions or deliberations in this case. You
3533 must under your oath decide this case purely on the evidence.

You know by this time that the defendant Malinsky is charged with the defendant Indovino and the defendant Rudish with the crime of aiding and abetting one Beitler in the commission of the crime of murder on the 15th day of February 1941, wherein a patrolman by the name of Fox was killed. I join with my friend Mr. Geoghan and I say I think that he who did it committed a dastardly crime, perpetrated upon one of our law-enforcing agents of our community and City. I
3534 hold no brief for the person who committed this crime nor would I stand on my feet here for one second to hold any brief for any person that even I appeared for if I thought for one second from my knowledge of the case, that the evidence in this case points to his guilt beyond a reasonable doubt.

When you gentlemen were selected as jurors in this case, you said you would give this defendant a fair and impartial trial on the evidence. You said you are going to be guided by the evidence and you said if you believed that if any witness

lied deliberately or wilfully to any material facts, you would throw out any part or portion of their testimony, or all of it. And you said the same thing about a confession.

Now before I start in by analyzing the testimony which I believe is important here, which has not been done for you gentlemen yet, and while it may not be necessary to do it, it may be fresh in your minds and it could be, however I sat here just the same as all of you, and many facts came to my attention that I did not believe 3536
were in the record and looking over the testimony, I found a great many discrepancies, a great deal of important matters, conflicts of testimony between various witnesses and, therefore, I am going to call your attention to those facts as I go along.

I want you to bear in mind that while it is my duty to appear and give you the facts as I see them, and the Court will give you the law as he sees it or as it is in this case, applicable to this case, the District Attorney, from my experience, will go and tell you in an inflammatory speech what this man Malinsky did, and how he went out 3537
with his pal and went over to his pal Spielfogel, immediately after the crime, for help; and after he went over to Spielfogel and he told Spielfogel that he just killed a cop, and then he went with Spielfogel, he went over to the store and there buried the pieces. And he will tell you what Slip, this man Slip testified to, how he buried the pieces and how he buried the money, the money in Rouch's, and he will give you all of this inflammatory statement adduced by the various witnesses here on behalf of the People, and then he will ask you by reason of their testimony that

you should say this man is guilty as charged in this indictment.

And he will also tell you, these disinterested people, Miss Jean or Virginia Goonan, and the brother-in-law, that testified as to the alleged statement made to them on the morning of February 15, 1941, when there was a knock on the door, or the morning of the 16th when there was a knock on the door about 2:30 a. m., and he told them he killed a cop. And then he will also tell
539 you, "What about this confession that he made; his voluntary confession that he made; that he implicated himself and others in the commission of the crime?"

And then he will tell you that this boy Peter Shamin, who here testified how he on the day of February 15, 1941, around 2 or 3 or 4 o'clock in the afternoon, wherein he went to the hall and got the pieces and that he took the pieces and brought it to him, and then he felt the top of the paper, and the wrapping around the paper and he felt the butt end of a revolver; and he is going to
540 ask you gentlemen if you believe all that testimony, this man is guilty of murder in the first degree and therefore he should be electrocuted for the crime as charged in this indictment.

Now, gentlemen, I am going to ask you for your undivided attention. I am not going to pull my punches. I am going to give you everything straight from the shoulder, and when I give you all the facts in this case, see if you don't agree with me, see if you cannot analyze this case as I do. I have been around these courts for a great many years.

Now thirteen witnesses were called and not

one of the thirteen touched on the defendant Malinsky. It was purely perfunctory matter that the District Attorney had to do for the purposes of coming up and leading up to the facts in the case. I have no quarrel with him about that; such as the diagram, the identification of the car, and various other matters that came up; thirteen witnesses. And that is the reason I said to you gentlemen at the outset, you are going to hear a great many witnesses. There is going to be a quantity of witnesses, and I asked 3542
you whether or not you are going to be convinced or satisfied by quantity or quality, and you all said quality.

Now at the outset it is agreed that there are no eyewitnesses to this shooting. The District Attorney says so. The facts say so. Therefore the District Attorney now relies upon circumstantial evidence for the purpose of connecting this defendant Malinsky. The District Attorney tells you there were two shots fired. He said so in his opening address and I have no quarrel with him. The District Attorney tells you, and 3543
so that we will have no question about it, or no quarrel about it, let us see what the record says.

The District Attorney, according to the record here, says that a man, a man, mind you, jumped out of an automobile, brushed Dolinsky, the messenger to one side and immediately fired a series of shots at the policeman: that this man Dolinsky was yelling for help and police, and this same man, one man, who was firing the shots, said to Dolinsky, "Drop that bag or I will drop you", whereupon Dolinsky dropped the bag.

Now the reason why I call your attention to

3544 *Summation on Behalf of Defendant Malinsky*

that is because I am going to, as I go along, show you how the testimony is just a little bit different than what is here and show you some of the people who gave the testimony here, under what circumstances they gave this testimony.

And he said that the defendant Rudish drove the car, Beitler was in the front seat and Malinsky was in the back seat. He said that Rudish was supposed to supply the car, and that Beitler was to supply the guns, two .38 and two .45 guns;
3545 and Malinsky was to go along.

Mr. McGough also said, and I am now reading from page 12 of the record:

"And at the particular time, gentlemen, I intend to show by competent, legal proof here, that Malinsky, when he was arrested, on the 27th of October, he made a full, voluntary confession, explaining in detail everything that was done. I intend to show that after he made that statement he took the police officers right down to the scene and told them how he went about it."

The reason I call your attention to that particular part of the testimony is I don't know
3546 what the District Attorney had in mind when he made that statement but I challenge him right now to show you one piece of testimony that Malinsky went anywheres at all after the 27th day of October, 1942, other than being at the Bath Beach Police Station and being around some time on the 27th day of October 1942 in the Felony Court in this building.

And of course after the 27th day of October 1942, you gentlemen should have it, and it is fresh in your mind, there was no statement or no conversation given by anybody here at all

that Malinsky made any statement after the alleged statement made at 2:10 a. m., I think it was, on the morning of the 27th of October, 1942.

Now the first witness we had that I want to call your attention to is this man Herman Dolinsky. Now I think it is fresh in your mind but I hope you will forgive me if I just try to refresh your memory; because this is such an important case I ask for your kind indulgence, and do not think I am trying to bore you or take up your time unnecessarily. Believe me when I tell you 354
I feel the strain as much as any man in this box or in this courtroom.

Dolinsky said that on the evening of February 15, 1941, that he saw a car parked just off the curb, that one door was open and the lights of the car were out and some man leaped out of the car, a man: "brushed me so I fell forward—that gave me a running position—and leaped at the cop."

And then he said, the same man that leaped out of the car, that jumped at him, grabbed the bag, and the same man shouted at him and 35
threatened him if he did not drop the bag, something would happen to him.

Now just bear that bit of testimony in mind and I won't touch much more on Dolinsky, and to make sure that there is not any question about it, I will read this one line from the record on page 51, when the question was asked:

"Q. Prior to these men jumping out of the car —A. I said 'the man' not 'the men'.

"Q. A man? A. Yes."

So the record clearly shows that and there is not any question about that, that just one man

jumped out of the car, one man fired the shots, one man grabbed the bag, and one man jumped back into the car and then the car drove away.

Now we come to the witness Yellin's testimony. That is the first bit of testimony you heard of anybody at all that mentions anything at all about this case as far as it is supposed to connect any of these three defendants.

Now he talks about Beitler introducing Indovino, and he talks about a message given him by
3551 Indovino about some job at Coney Island, and mind you, this man Yellin in detail, almost in detail, page after page of testimony, talks about just how this crime is alleged to have been committed and he talks about Indovino giving him this information and he talks about $1,000 being involved in it; and while he never mentioned Loew's Theater, Slip was the one who said something about Loew's Theater. He just added something to what Yellin said happened on this particular night. Now Yellin was not working at the time. He was out of employment, and
3552 isn't it significant at this time to note that Yellin was just around the East Side at that time, and according to what he says, he was playing cards that evening at some candy store at 8th Street, beween C and D, and isn't it significant at this time to note on this particular night, on this night in question, he says that Rudish came over to him and asked him whether or not he saw his wife around; had she been around that night, and he said, "No," he did not see her. And then Rudish said to Yellin, "I must duck the pieces."

Now if my memory serves me correctly, and

see if that does not jibe with yours, Slip testified that Malinsky said he has got to duck the pieces.

Now we had Yellin testifying here that in the early morning of February 16, Rudish said he was going to duck the pieces.

Now how are you going to arrive at the truth? How are you going to come to a conclusion as to who is telling the truth? How can you say to yourself, "Can I say to myself from this testimony, am I satisfied beyond a reasonable doubt, by believeable, credible testimony that I can 3554
hang my hat on, and so there may not be any question of doubt as a reasonable man in my mind, that these men are guilty."

You must only come to that conclusion from the testimony that is adduced here, and if they do not dovetail, if the link in the chain is broken to such an extent that you cannot be satisfied beyond a reasonable doubt that their testimony is credible and believable, you must vote Not Guilty, because that is what you said you would do under your oath of office.

Now he told you that this man Rudish had 3555
a lumberjacket on him and that he had packages there and packages here; the packages were bulging out, and he demonstrated physically as he stood in this witness chair and he stood up, how this thing happened; how he patted himself on the chest, and where the guns were supposed to have been, and he said he had to duck the pieces.

Now he also told you that he met—I am not going to leave anything out. I will put everything in. I am going to give you everything that you want to know to take to your jury room

and dissect the testimony in your own minds. No living man in this court or anywheres else on the earth now has anything to do or anything to say about the evidence and as to how you gentlemen should be guided other than your own-self and your own conscience and that should be your guide. What you think in the inner recesses of your heart, that should be your guide; and if you believe from the evidence here that there is not sufficient, you must say so, and not
3557 what anybody else thinks there and not what anybody else thinks about it.

Now he said he met Morris Malinsky at 8 o'clock on the evening of February 15th at 7th Street and Avenue D. He said he saw him speaking with Spielfogel. I don't know just what experience you gentlemen have had but I take it that most of you have had sufficient experience; from all different walks of life as you are assembled here as jurors that you have had sufficient experience to know that men of Yellin's type, of Slip's type, and of Beitler's type and
3558 of Kovner's type, when those rats are cornered, when those murderers are cornered, they are the yellowest and most contemptible scoundrels that ever lived. They are great, they are brave, each one armed, and where the poor citizens are walking through streets, and the highways and byways of the City of New York, with nothing in their hands and nothing to protect them, and as they stick you up and hold you up and shoot you; sure, they are brave, but the moment those rats are cornered, they yell, "Copper", and they yell, "save me, save me", and they throw up their hands.

Yellin never made a statement. He never said a word to any living man in the world as to what he knew about Rudish; what he knew about Malinsky and what he knew about a Fox case. There is no question about that, gentlemen. I hope that is fresh in your mind and if there is any question about it, please come back and ask the judge to have that portion or part of the testimony read to you. The first time that he ever made a statement was some time in October 1942, and the statement of October 27, 1943, was taken down stenographically. 3560

Now you know I asked him and I had reasons of course, when I said to him, "Yellin, when you were brought down, did you tell the District Attorney everything?" I will give you the question and answer. It is on page 163 of the record:

"Q. Mr. Yellin, when you made this statement to the District Attorney, on October 27th, 1942, you told him everything you knew about this case, didn't you? A. No.

"Q. You withheld something, did you? Yes or no? Did you withhold anything? A. Yes." 3561

Now, why did I call your attention to that? That standing by itself means nothing. It does not mean a thing. But the underworld characters, he did not know how far Slip went, how far Kovner went, and therefore just gave them some part or portion of it because he did not know then whether or not they stuck him in, whether they stuck themselves in or whom they put the blame on, and whom they put the responsibility on that committed this crime, so he just told little pieces of how this thing happened, and then later on came around after consultation with Mr. Kovner

and Mr. Slip and himself, they brought in three persons.

Now you may think that maybe this fellow Solovei is talking through his hat. Maybe you think that I am just telling you this because I want to distract you from the evidence in this case. Maybe you may think I am telling you this, making this statement just out of the sky and pulling something down. I am making this statement to you gentlemen, coming right from here
3563 (indicating the heart), and I am telling you this now because these three men did not commit this crime of murder in the first degree as alleged in this indictment. The murderers are here and they have not been apprehended and they have not been tried; Slip, Yellin, Kovner and Beitler; the pals, the associates, the murderers of this man Fox killed in cold blood.

Now from 1941 up to October 1942, Yellin had plenty of trouble. He was going about his business, not working, sticking up places; sticking up poolrooms, handling revolvers, and according to
3564 Slip's testimony, he said on May 10, 1941, "When Yellin and I went out to do a job, I did not have the guns; Yellin had the guns."

Now they have plenty of trouble of their own. They had been in numberless stickups. Slip had trouble trying to tell us what happened on May 10, 1941, when he and Yellin were apprehended and charged with this crime of robbery in New York County.

Now Yellin made 62 trips to the District Attorney's office; 63 trips to the District Attorney's office, or with the police. Now what was the necessity of bringing him back and forth, back and

forth, back and forth continuously? I believe if the truth were known, and if you could get it direct from somebody, who was really investigating this case, they were not satisfied with Slip and with Yellin because they did not believe their statements that they made to them, about implicating these three men in the commission of this crime; and therefore trip after trip, trip after trip, "Go and see your wife; go out with your family; visit your family;" a man doing 30 to 60 years, giving him all the privileges that an ordinary citizen is entitled to. Taking him out for lunch; walking through the streets unshackled. 3566

Those trips back and forth were for a reason. The police were not satisfied that they gave them the right men. Now, who could they bring in. They could not bring you in. They could not bring me in. They knew Malinsky from around the neighborhood. He worked over in Rouch's store. They knew Malinsky from Elmira. They knew Indovino from Elmira. They knew Rudish from living around the East Side. And when it comes to saving your life, and when it comes to saving your soul, those men won't hesitate in putting anybody in the middle as long as they beat the rap, as they call it; as long as they beat the rap. Years mean nothing; 15 to 20; 30 to 60; 10 to 20; that does not mean anything to them. But when they smelled that electric current coming closer and closer to them, then they had to get their shoulders to the wheel and put their heads together and so it looks like somebody squawked, somebody squealed. 3567

Now will you tell me how on God's earth anybody knew—there was no testimony here by any-

body that anybody knew that Slip, Yellin and Kovner knew anything about this case? Nobody. They spoke to nobody. They never mentioned it to anybody and they never said a word to anybody, but I tell you that the police were on their tail, and the police were getting close to Mr. Kovner, Slip and Yellin; and when they got close to them, and so close, then they stuck these men in. Now they knew each other. They were very friendly and it was just a case of substituting
3569 names; that is all.

Now this man Yellin comes here and he has the audacity to tell you gentlemen of the jury that he, who is doing 10 to 20 years, and the same thing with Slip, who is doing 30 to 60 years, that they do not expect any consideration at all from anybody; that they do not expect any help from anybody.

Now is there anybody in this jury box that could believe any such thing? That they do not expect to be given some consideration by their sentence somewhat being lessened. By some rec-
3570 ommendation being made to the proper authorities to see that they get credit for what they have done because this is a very important case. The police were very anxious to break this case. A cop's death was involved. A cop was shot and killed in cold blood. Everybody in the City and State of New York wanted to break it and they knew the importance of it, and do not let them tell you they do not expect to be given some consideration.

And then both Yellin and Slip, like teamwork—I said to them and in answer to a question, "Would you lie to save yourself", they said

"No". "Would you commit perjury to save yourself?", and they said "No". "You would not commit perjury even in this case if it would help you? A. No, I would not commit perjury to send a man to the chair, not in a case of this kind."

"Not in a case of this kind", I think he said, because men's lives were at stake, he said. They make a distinction between perjury, ordinarily where a man may get 30 to 60 years and where men's lives are involved". Then they draw the line where a man's life is involved, they say 3572
"No", but if he is going to get 30 to 60 years, maybe they will just commit a little bit of perjury.

Now I say to you gentlemen here to scoundrels and skunks like that perjury means nothing, absolutely nothing, and they won't hesitate in committing it in a minute as long as they thought it would help them in some repect.

Now I asked Yellin when he first knew about this crime and he said he knew it right from the beginning. Now let us see what his exact language is that he used about that, and of course 3573
he knew it from the beginning and there is no question about it. I am reading from page 179 of the record:

"Q. Now, you knew about this crime as you say, from practically its very inception, didn't you? From its very beginning you knew about it? A. That is right."

Now of course the District Attorney can come along and answer that and anybody can. He can say, "Sure, Indovino spoke to him four or five days before so he knew about the crime right from the beginning." But, gentlemen, he knew about

the crime and I will show you as I go along because he, Slip and Kovner and Beitler were each cooperating, aiding and abetting each other in the commission of this crime, and wait until I will show it to you; and he knew about the killing because Rudish told it to him that night.

Now, gentlemen, do you think for one moment, and I don't know this boy Rudish; I am not his attorney, but I feel in reviewing these facts it becomes necessary for me to go over the entire
3575 case; do you think for one moment, on the morning of February 16th or that late evening of February 15, 1941, that Rudish would go over to a candy store to Yellin and say to Yellin, "We just killed a cop and I got to bury the pieces", and patting himself on the chest and practically putting himself and his life in the electric chair?

Gentlemen, that is not done that way and it was not done that way, and it did not happen; and this entire statement by Yellin is an absolute falsehood and lie and he knows it, and he knew it when he gave it right from this witness chair.

3576 Now as to Yellin, I don't know what the Judge has in mind about charging you as to Yellin, whether he is an accomplice or not; but whether he charges you as a matter of law, I am absolutely positive he will tell you something about accomplices, as to whether or not you believe that he is an accomplice as a matter of fact; whether or not you gentlemen can say by your deliberations whether or not Mr. Yellin was an accomplice, and if he was an accomplice and if he did partake in this crime, he should be right there, he should be right there as a defendant. And don't go to your jury rooms and say to

yourself for one second that if we during our deliberations believe that there is a doubt in our minds as to the guilt of these defendants that this crime will remain unsolved or that the crime will be shrouded in mystery? That is of no consequence to you. And Mr. Kovner, and Mr. Yellin, and Mr. Slip, when the times comes, they are not immune from punishment here; those three, someday in the very near future will be defendants and they will sit here then as you are standing here and I am standing here talking 3578
to you gentlemen; will be right in that chair, one, two, three; Slip, Yellin and Kovner; three defendants charged with the murder of Fox, even though they testified here. They are not immune and they have received no immunity, and they are not going to get away with it, because some day it will be proven, something may happen by an act of Providence, that somebody will come forward and put them right in and put them where they belong, and there will be an eye-witness, and there will be somebody who saw them and who could identify them. Right 3579
at this moment, there is none and they know it, but they will not get away with it yet in spite of their testimony: in spite of them being here and testifying and assisting the prosecution.

Now did you ever see a more slimy, sneaky contemptible thief than his associate and pal, Mr. Slip Spielfogel? He said he met Yellin, and told him he ran into Ebbie. He said, "Joe the Tiger has got a piece of work for you at Coney Island, supposed to be at Loew's." Now that is the first time anybody mentioned Loew's, because Yellin did not say anything about Loew's.

3580 And I say, in a minute detail he described how the rookie cop was supposed to be walking with this paymaster from Loew's, and that it was a dark place out on the Island; it was a soft take, and he, Slip, said, "He was not interested as long as Tiger gave it to him; he did not want to have anything to do", he says, "with that Ginny bitch or bastard". I don't know what he said, but it was something like that, or with that gang", I think he said. I do not know if he used
3581 any other language. And then he says he ran into Beitler, and Beitler repeated the entire conversation to him about a job in Coney Island, and Beitler said that the Tiger said, "There is nothing to worry about". And he said to Slip, "If you don't mind, I would like to use the pieces."

Now he did not go to Malinsky for the pieces. He went directly to Slip for the pieces; you probably know by this time "pieces", they mean guns. He went directly to his pal, his friend and associate, that he knew for a great many years, for the pieces, right to Slip, who had the pieces,
3582 who used the pieces on numberless occasions.

Now Slip says he did not like that job. You know they speak of things like that when a fellow goes out and he walks into one of the stores and says, "I am a good husky fellow, 25 years of age and I would like to get a job carrying packages," and the fellow looks him over and he says, "will you work from 7 o'clock until six in the morning?" He says, "I will work from 9 to 5", and then you walk out and they let you walk out when you say, "I do not like the job, the hours are bad." And that is how Slip and

Yellin acted, they did not like the job. Why didn't they like the job? Why didn't Slip like the job? Do you think the hours were a little bit rough? He said, "when I put a gun in my hand, and I told him, I ain't going to worry about after effects. I says I don't want no part of it."

When he goes on a job, he won't get the proper working hours, he wants to put a gun in his hand and he wants to do the job right. Now doing a job right means that he wants to kill you 3584
like a dead mackerel and let you lay there and make sure that it is a dark street and there are no eye-witnesses and nobody around; and he thought this job was a little bit tough because the cop was around Coney Island with a man by the name of Dolinsky, and Dolinsky was a paymaster and maybe if it was not a clear getaway, somebody might see him and therefore he did not worry about the job when he went up on May 10, 1941, in a poolroom where there were a number of people and they stuck up at least half a dozen with loaded guns. He didn't worry 3585
about that job. He thought he had all those fellows up in the back there and none of them would squeal, in the poolroom stickup. Nobody would dare squeal on Yellin and Slip or Kovner or Beitler, because if they did, something may happen. But fortunately, those men in the poolroom did squeal and fortunately for the public of this County and the City and the State and the country, two bums like that will at least do some time in Sing Sing, and I hope they do every minute and every day, and before they do every minute and every day, I hope to live to see the

that those three men will be sitting in this chair, where they will be before Judge Leibowitz or before some other judge as defendants charged with the murder of Fox.

Now when Beitler came for the pieces, he said he did not have the pieces; the pieces belonged to Moish Malinsky, and he said he would have to go to see Moish Malinsky to get the pieces, at 10th Street and First Avenue.

Well, I am not pulling anything. I am trying
3587 to give you everything for or against, so you can just go to your jury rooms and deliberate and say to yourself whether that is the testimony or whether I misquote or leave anything out, and the stenographer is here and all the testimony is written up, and it is a very simple matter to get any portion or part of it, to have it read to you.

Now Slip says that about 1:30 a. m. on February 16th, the defendant Malinsky came to his house, and Slip says the defendant Malinsky, when he came to his house, said to him "Slip,
3588 I was out to Coney Island and just shot a cop." He had no hat on and he gave him a description of just how the crime was alleged to have taken place, and he said that—I think he used the words, "I was in a shooting match." He said, "I want to talk to you." I said, "Wait a minute, take it easy, Moish." My wife was there. I stepped into the hall with him. He said, "We had a shooting match; get dressed. I got to talk to you." So I went back to the house, got dressed and left with him and went to the Citadel Club. He then also said,—I asked him about his hat and he said it was Hershee's hat, "I dropped

it on the hoist," meaning where the crime was committed, "after I jumped out."

Now, gentlemen, there were witnesses brought here from the State of Washington, Texas, and various other parts. They spared no expense in bringing witnesses here to testify. I do not say this by way of criticism of the District Attorney's office. They had a perfect right to bring anybody here they saw fit for the purpose of breaking this case. But I say to you gentlemen here, that while it is the District Attorney's 3590
duty to see that every guilty man goes to jail and that every bit of evidence that he has here in his possession is submitted to the Court and jury for their consideration, I say to you that every bit of testimony that he has or could muster or get together must be brought into the courtroom, whether it helps or hurts; whether it helps the defendant or hurts the defendant, in justice to these defendants, because the District Attorney represents you and he represents me, and in certain instances he represents the defendants to see that proper justice is done in cases that 3591
are brought on for trial.

Now you remember Slip said that his wife was there. Slip said he got dressed, and when he got dressed, Slip said that his wife was peeved about him going out, that is getting dressed and going out, and she said, "If your friends mean more to you than I do, don't come back". And she got up and he said he went back and got him a green hat.

Now what I want to ask you gentlemen is this; if the defendant Malinsky was in Slip's house about 1:30 in the morning of February

15th, or 1:30 on February 16th, 1941, and Slip's wife was there, and Slip and his wife are very friendly because she visits him and did visit him continuously while he was at the 161st Street Jail and up at Sing Sing, and did pay a little attention to him while he was down here, and they are very friendly, and she has no criminal record as far as I know, why wasn't it the duty of the District Attorney to produce Mrs. Slip, Mrs. Spielfogel and bring her here the same as
3593 he produced that prima donna Jean Virginia Goonan, who I will come to later on. Why didn't he produce this Mrs. Slip and say, "Mrs. Spielfogel, do you remember being home on the morning of February 16, 1941?" "Yes." "Did anything unusual happen on that day?" "Yes." "What happened; tell this Court and jury what happened." "I heard a knock on the door and my husband got up and opened the door and as he opened the door in came Mr. Malinsky with his hair all disheveled, and when his hair was disheveled, he said, 'I just came from a shooting
3594 match and I had a shooting match down in Coney Island.' "Where is your hat?" 'I got the hat from Hershee Levine; my hat flew off in the hoist,' and then my husband got dressed immediately and went out, and then he came back and took the green hat. And when he took the green hat I said, 'If your friends mean more to you than me, then don't come back.' "

Is there any question about that in your mind that that is the testimony in the case? If there is, I will give it to you verbatim, question and answer, right here, without any trouble at all, so that you will know it.

And before I go any further, so there will be no question, I just put my finger on it and here it is; at page 235 of the record in this case, and the reason why I call your attention to it is this, because I say there are certain facts in this case that speak louder than words. Sometimes you may be mistaken when you say, "I saw a certain accident happen. The car went 15 or 20 miles an hour and the man took a left turn at a speedy rate of speed;" and another fellow comes along and says, "No, he took the right turn and he 3596
was not going fast". So your optical illusion may sometimes deceive you, and you may think certain things happened when they actually never happened.

But they say, "While witnesses may lie and while your own version or idea about things may be different than others, circumstances, circumstances do not lie because you can put your finger on the circumstance and you can connect it up, and when you connect it up, you can see there is a method in their madness, and there is a reason for withholding certain things.

3597

I asked him if he was married, and he said, "I should hope to smile I was married".

Now I will give you that in a miunte, in question and answer form. Now why is it that she was not called as a witness? I cannot answer that. Everybody was called and you gentlemen will agree with me that if she was here, her testimony would be very important and very interesting, to say the least.

And Slip says he knew all about the guns; Slip says that Malinsky said to him that the same guns were used that he got from Red

Tippler sometime ago. And you remember that Red Tippler said that he never spoke a word to Slip or anybody at all about this case, and never told him about the guns or getting any package at all. We will come to his testimony later on.

And Slip also said to you gentlemen here that Rudish said, when they got up on the elevated station, he told you—first he said that Malinsky said that they made their getaway by taking a
3599 taxicab, getting out of one cab and getting into another cab; two cabs, and then he went to New York. Is that correct? I think that is what the testimony is. And he said Rudish said that he went up on the elevated, and Slip says that Rudish told him that the sirens were blowing and the fireworks were going off, and that he also saw some license plates.

Now isn't it significant to know that Slip remembers all about sirens, all about fireworks, all about license plates, and he says that somebody told him. Gentlemen, nobody told him a
3600 thing about this case. Nobody had to tell him a thing about this case. He knew about sirens. He knew about fireworks. He knew about license plates, because he, Yellin, Kovner, and Beitler were on the job and they knew all about it.

Isn't it funny that he did not know anything at all about three holes in his pants. I asked him whether he did not have three bullet holes in his pants. "Didn't you shoot out of your pants pocket something or other?" He did not know he had three holes and he did not know somebody had shot at him. I asked him whether he was shot in the leg where those three holes were and he said,

"No", and after pressing the question, he said it could have been holes from a gun.

And then he comes here and tells you that he won't shoot it out with people. He tries to tell you he won't shoot anybody. He would shoot his way out any time he was cornered and any time he knew he had the best of it because that is the kind of a rat he was, because if he thought he was cornered, on the same footing, where some law-enforcing agent had a gun, that dog would not shoot because he is too yellow to shoot 3602
it out with anybody who might have a gun and give him the same kind of break. No, he wants to shoot it out with people whom he won't give a break.

On page 238 the Court asked this question:

"Q. Was there anything said in the presence of your wife by Malinsky? A. She probably heard it. I am not sure.

"Q. Was there anything said by Malinsky to you while your wife was in the same room? A. No, she was in the next room."

On page 243: "Q. Well, when Malinsky ap- 3603
peared at your house that morning, your wife was fast asleep, is that right? A. She woke up when he started banging.

"Q. What? A. She woke up when he started knocking.

"Q. You went to the door and opened the door? A. Yes, sir.

"Q. When you say she woke up, she remained in bed? A. No, she got out.

"Q. She got up and got out? A. Yes, sir.

"Q. She got dressed? A. She was angry. She said, 'If you go out now, don't come back.

If your friends are more important, go with them.'

"Q. She wanted you to stay home? A. That is right."

Now with that in mind I again say to you gentlemen, she is not here. She did not testify. You have a right to believe that part of the testimony if you like or you could disregard it and say that he lied about it. It could have been brought out more fully and more definitely
05 and more clearly by a person who it not a thief, a convict or a murderer like he is.

Now Slip said that Malinsky hollered to the man. Slip says that Malinsky told him that he jumped out of the car. Slip says that Malinsky told him that he fired some shots. Now the People make no such accusation at all. In their opening statement the People say that only two shots were fired; that only one man fired the shots; that only one man grabbed a bag, and that only one man jumped out of the car, and that the same man that grabbed the gab, that
606 fired the shots, that hollered to Dolinsky, "Drop that bag", is the person that shot and killed Fox.

Now if that is so and that is what Mr. McGough said to you gentlemen in his opening, and that is what the manager of the theatre said happened, that is how it happened.

Now he said it was not his hat. May I have that hat please, Mr. McGough?

Mr. McGough: Yes.

Mr. Solovei (continuing): Malinsky said this hat was not his. It never belonged to him. He never saw this hat in his life before, this People's Exhibit 14 in evidence. Now he took the witness-

stand and at the instance of the Judge and District Attorney, they tried this hat on, and when they tried the hat on, he was pulling one way and the other way and he said the hat does not fit. I say to you the hat does not fit. I say that hat did not fit him when he tried it on here. I am now going to show, so that there will be no question this hat, whether it fits or not, whether he tried to put that hat on properly or not, so that you gentlemen can judge for yourselves, because it is you gentlemen that are going to 3608
decide from all the facts in this case whether or not this defendant shall be one of the persons convicted in this case, maybe sent to the electric chair.

It is not a question of dollars and cents that your judgment is going to bring forward; it is more than that, and we cannot get another crack, as a fellow says, at it. This is our day and this is our time and we must prove to you people here that we can convince you that we are innocent. I am going to ask the Judge's permission that the defendant come forward in the presence of 3609
this jury box, and with the Judge's permission, so that there will be no tampering with this hat and nobody saying whether or not he is putting it on right or wrong. I am going to ask the Judge to permit one of these jurymen to try this hat on the defendant and see for himself whether this hat does fit this defendant by using the ordinary method of putting this hat on, to see whether or not it does not fit as we contend.

Now may I have your Honor's permission, please?

Mr. McGough: I object to this. Is this a

summation or is this taking new testimony, or what?

Mr. Solovei: This is a summation, Judge, and this is in evidence and there is a question whether or not it fits and I do not want to try it on. I do not want the defendant to try it on. I want the jury, who is going to judge the facts in this case, to say whether or not by them placing the hat on this man's head in the ordinary way of putting a hat on, whether this hat fits or not.

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The Court: Let me think that over for a few moments.

Mr. Solovei: I will proceed to some other matter.

The Court: Proceed to some other matter.

Mr. Solovei (continuing): Thank you. Now, gentlemen, if this crime was committed as Spielfogel wants you gentlemen to believe, do you think for one moment that this man Malinsky, the defendant here, who has been in Elmira, who has been charged with attempted robbery in his life before, who has served time of practical imprisonment because Elmira is not a summer resort, do you think that he would go and be so brazen as to go to Slip's house, in the presence of his wife, and then make Slip get dressed and then go down with the pieces. How many people had the pieces? Rudish was supposed to have pieces. Beitler was supposed to have pieces, and now we got my defendant with the pieces, according to Slip, and he took him to Rouch's store, to Rouch's store. Would he take him to Rouch's store where he said he had a key, and there is not any evidence here in the

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world by anybody that Rouch ever gave Slip a key. I mean, gave Malinsky a key, or that Malinsky ever had a key to the place of business. Rouch is in business in New York County and he could have been brought here by the District Attorney if he wanted him because he knows Rouch. He knows he could have had him here and he knows Rouch's conversation. He said he not only buried the pieces but he went further and said that he took all the silver and buried that, too, or put it in Rouch's store. 3614

Now do you think for one moment that any man has the nerve and audacity, the temerity to do any such thing so open and brazen after killing a cop? Do you think these men who kill cops, who go out on shooting matches, go out and place a big grand new halo on the back of their heads and say, "Here, I just went to Coney Island and shot a cop; got $200 and got two sawbucks", as he says "extra";—two sawbucks extra for doing the job, a pretty good job, he said that to Slip;—and go out nad advertise it and put it on record to every person in the world so he can just put himself right in the electric chair. 3615

No, gentlemen, that is not done—

Mr. McGough: I am going to object to any more mention of the electric chair or penalty. Penalty is something this jury cannot concern themselves with. I have heard it four times already.

The Court: I will let him say it a million times. Mr. Solovei has the right to use the words "electric chair" as often as he wishes to.

Mr. Solovei: I said, would the defendant do that?

The Court: You can talk about the penalty under certain circumstances, that it is the electric chair. The jury knows it and there is nothing mysterious about it. Of course, I am going to charge the jury and they will follow my charge.

Mr. Solovei: I am not giving them any question of law. The Judge will charge you on the law.

3617 The Court: Gentlemen of the jury, as to the penalty, I will charge you on that.

Mr. Solovei: He will charge you on all of this.

The Court: There is certain new law pertaining to penalty, but if you want to talk about the electric chair, you can do it to your heart's content. Objection overruled.

Mr. Solovei (continuing): I am making a comparison, gentlemen. I am trying to call your attention to the fact that a man having that in mind in his proper senses does not do those things.

3618 But you had an insane man on the witness-stand here. You had a crazy bug, a bug, a murderer and an insane man. Slip was seven or eight months in the bughouse at Elmira Reformatory, and he knows he was in the bughouse because he was out of population. And out of population means he was confined, as he says, to the bughouse, but he says he did not see any bugs there. That might be true because the only bug and the only piece of vermin there probably was he, Mr. Slip; and on that kind of testimony they want you to convict this man.

Who knows? Who could not possibly under any circumstances find out whether or not—how this man's mind is operating; what kind of mind he has and if he was properly under psychiatric examination by the proper authorities. He was examined in New York County by a doctor in New York County at the time that he was convicted of the crime, and significant enough, when he even spoke to the doctor, *according to his own* testimony, he lied to the doctor. He could not even tell the truth to the doctor that examined 3620
him.

So he comes here in a Court of Justice, where people are on trial for their lives, and he expects you gentlemen to believe that nut of a murderer, who could not tell the truth to Dr. Cassidy in New York County. He said so with his own lips and you heard him say so.

Now let us get on a little further. In furtherance of the conspiracy between Slip, Yellin, Kovner and the dead Beitler, Slip says he made a further trip at 2:30 a. m., another trip. This time the trip was to Shirley's house. Shirley knows Slip. Di Pisa knows Slip. Jean or Vir- 3621
ginia Goonan knows Slip. There is no question about that, so let us start off with those circumstances in mind. And Slip says on that morning he went into Shirley's house. That is right, isn't it? If it is not right, your recollection is what counts. I will read from page 254 of the record which is as follows:

"By the Court:

"Q. I would like to know what happened up at the sister's house. What happened up there

when you and the defendant Malinsky went from the store, or shortly thereafter, to the sister's house? A. He told me he wants to stake her.

"Q. He wants to what? A. He wants to stake her on a few bucks. In other words, give her a few dollars, and he don't want to go home because the parole officer might be around, so he wants her to talk to the brother-in-law for him to stay there."

Now that is not what Di Pisa said happened
3623 and that is not what Virginia Goonan said happened. They said something else which I will call your attention to afterwards.

At page 255 of the record is the following:

"Q. Did you actually go with him to his sister's house? A. I did.

"Q. What part of the house did you go to? A. I went all the way up into the house, into the kitchen.

"Q. Into his sister's apartment? A. That is right.

"Q. With him? A. That is right."

3624 Now, gentlemen, in the name of everything that is holy to you, how in the world could you reconcile the testimony of Virginia Goonan, Di Pisa and Slip? Isn't there something wrong there? Did you hear Virginia Goonan at any time say that Slip was in the kitchen, or that Slip was in the house? Now how are you going to arrive at the truth? Are you going to arrive at the truth by just flipping a coin? Are you going to arrive at the truth by saying, "I like the fellow's face?" Are you going to arrive at the truth by taking all the testimony and putting it together and saying whether or not there

is not a colossal gigantic scheme and conspiracy on the part of Slip, Yellin, Kovner and the deceased,—of course the dead Beitler,—and to see whether or not there is something here that they have got to go through with, have got to follow through for the purpose of saving their necks.

Now did Di Pisa say Slip was there? Now did Di Pisa say he saw Slip that morning? Now did Virginia say she saw Slip that morning? They all know Slip and he went right up. The answer to that is that he never went there with 3626
Malinsky. Malinsky was not there that morning, and I will show you when I come to her testimony and his testimony, I will show you a piece of business here that is disgraceful, that is outrageous, and I don't care whom it hurts, and I am not pulling my punches and I don't give a darn whose face is red about it, but it is outrageous and disgraceful and disgusting to think that they can grab people by the throat, throw them in jail, hold them as material witnesses and do with them as they darn please because they have got the law on their side, and we cannot, poor people, do the same thing because we have 3627
not got the operative machinery to do that with.

Malinsky was sending his wife some money. Malinsky was helping his wife out, Slip's wife. He stopped. He said, "I won't do it any more," for some reason or other, I don't care.

Slip says he is sore at him. Slip says he don't like him. My man, the defendant, says that he was being accused of having relations with his wife and he says he got him out of a barber shop, he and Yellin went up to him and they drew guns at him and said—I don't know whether he used the word "son-of-a-Bitch" or

something like that, but he said, "If I find out that you had intercourse with my wife," Slip says or Yellin said, "why, I will blow your brains out. Come on upstairs," and they took him up in the house and they confronted him with Mrs. Slip and she said, "I didn't have anything to do with him"; and Mr. Slip, the slippery eel that he is, he held back and he banged his wife in the eye, and the defendant said, Malinsky said, he gave her a black eye because she said he had nothing at all to do with her.

3629 Well, there is no question about it, that there is bad feeling between Slip and Malinsky, and there is no question about it that Slip and Malinsky have had some trouble; and the trouble is all because this thief thought that somebody was doublecrossing him that he knew, and that little bit of code there is among those thieves of his slimy type, "Don't let anybody go fooling around with my gal, whether she is my wife or gal, whatever you cal it. Mrs. Yellin. He had a Mrs. Yellin, his wife. Some gal that he was living with, Mrs. Yellin. "Is her name Mrs.

3630 Yellin?" "No." "Are you married to her?" "No." But anybody that tries to fool around and step on his corns in that respect is going to find a little trouble.

Now I want to get through with Slip and then I am coming to the confession for a minute. I think Slip said first he did not know Kovner and I know that Kovner said that he did not know Slip until he met him in Sing Sing.

Well, now, let us see if I am right about that. As I said to you before, there is something wrong some place when people are trying to hide their friendship amongst themselves, and I know there

is something wrong because when they tried to do that, anybody that has had any experience with police or investigations will know that they are scared, they might bring them in, and so they knew each other all the time and they know in all probabilities where to go on the morning or evening of February 15, 1941.

I am now reading from the testimony of our friend Samuel Kovner at page 632, where I asked him:

"Q. Are you friendly to Spielfogel, Slip? A. 3632
I met him in Sing Sing.

Q. Prior to that, were you very friendly with him? A. I never knew him outside. I never knew him before I see him in Sing Sing.

"Q. Did you ever see him around the East Side? A. No.

"Q. How about Yellin? Did you ever know him? A. Didn't know him until I see him in Sing Sing."

That is Kovner. Well now we have got Kovner. Let us see what our boy Slip says about that. Let us see if Slip agrees with him. You know, there is an old saying, "When you make 3633
a hole for somebody to fall into, you are liable to fall into it yourself." And he has been trying to make holes for other people and he got buried, and he cannot cover all their traces because they are not so smart that they can do that.

At page 305 of the minutes is the following:

"Q. You know Sam Kovner very well? A. I know Sam Kovner.

"Q. How long have you known Sam Kovner? A. I will say about eight years, I guess."

Slip knows him for eight years. Kovner don't

know him and never saw him in his life before he met him in Sing Sing. Now how are you going to reconcile that? Slip says he spoke to Kurt Lawrence and told Kurt Lawrence about it, and he also spoke to Sam Kovner up in Sing Sing about five or six months after he got into Sing Sing Jail; up there he spoke to Kovner and he told him something about the Fox case; and Kovner said he never spoke to him at all; never spoke to Slip at all about the Fox case, in
3635 Sing Sing. Kurt Lawrence of course, we do not know. As far as we know, he is not here and don't know anything about it. He was not brought down and did not testify. What his testimony will be if he was brought to Brooklyn, I don't know.

Now let us see, what about this confession? Now there was a statement taken from the defendant Malinsky. He was arrested on October 23, 1942, as he was leaving his house about 7:15 a. m., and from there he was taken in an automobile to the Hotel Bossert. The Hotel Bossert, not being a police station, not being connected
3636 with the District Attorney's office, being one of the hotels in the City of New York, not being in anywise connected with law-enforcing agencies of the City or State of New York, we who are familiar with that kind of practice, they took him to the operating room, the Hotel Bossert; for the purposes of operating without an anesthetic on one who is arrested charged with the alleged commission of a crime, for the purpose of trying to find out whether or not he was implicated and if they cannot get a confession from him, whether they can pull it out or drag it out or any way at all.

The first thing they do, they get him up there and they strip him; take all his clothes off. While Lieutenant McNally and everybody involved in the case are nice fellows, there is not any question about that, but what they gave here was a novel excuse and one I never heard of before; that they stripped the defendant Malinsky in the Hotel Bossert for the purpose of seeing whether or not he had any gunshot wounds. Well, all right. If they did it for that purpose, it is perfectly all right, but after you 3638
examine a man's body and you looked at him and you saw no gunshot wounds, why not let him get dressed? According to McNally, he was stripped until about 3 o'clock in the afternoon, and after that he was permitted to put his shorts on and he remained in his shorts from I don't know whether it was from 8 o'clock in the evening until 3 o'clock in the morning, and then they gave him a blanket. He was stripped when Assistant District Attorney Heffernan was there in the afternoon; he was walking around with his shorts on when Heffernan was there. They say Heffernan did not ask him any questions or 3639
some questions. The defendant Malinsky says that Heffernan asked him questions.

The defendant Malinsky says, and even Spielfogel said that Malinsky said that, "I maintained my innocence; I told them I know nothing at all about this crime, about the Fox murder. I did not participate in it directly or indirectly and had nothing to do with it."

Now what happened? They took Spielfogel and put him in a room. That they admit, in the closet. Spielfogel had a conversation with the

defendant, and my defendant Malinsky says that Spielfogel said to him, that ingenious mind, having all the time in his mind that he and his friends are trying to save themselves; "Moish, tell them, identify the car, the blue Ford car, with a what-do-you-call-it, with a cloth top. Tell them Rudish and Indovino were with you. Tell them that you went to Coney Island; that you fired some shots; that you were there when the Fox murder was committed," and then he went
3641 on and he gave him a minute detailed description of how it happened, and then he answered the questions, and if you noticed how he answered the questions, the District Attorney read it to you; he did not make the answers by giving long lengthy answers—the question was, he said he stole a car and he just gave answers to what questions were propounded to him in very short order.

Now this was on October 27, 1942, that this confession was taken at 2:10 a. m. in the morning. Where is that statement that was taken by somebody, I do not care who it is, on October
3642 23, 1942? Where is that paper? And where is the statement that was taken on October 25th, or October 26th, as Detective Celano said, at the Bath Beach Police Station? Where is that paper? Why can't we have that? And why can't we compare documents and take notes and see whether they are the same? Why withhold that from these defendants? Why say that we just took notes down and made our little references to different things without bringing it forward?

Where is the Assistant District Attorney Heffernan, who sat in that jury box, right di-

rectly opposite you, when this case was going on? Why isn't he here to say that this man made a voluntary confession?

"I told him, I advised him of his rights; I protected his rights and I said make it if you want to; if it is true, make it, and if it is not true, do not give it to us."

Where is that Assistant District Attorney, this distinguished gentleman, who I know if he was here would tell the truth? Where is he? He is not here because they know that Assistant Dis- 3644
trict Attorney Heffernan took this down in the regular course of business. He was there and took it down and he did not like the smell of the whole thing because it just stunk; that is all; because he did not like what was going on at the Hotel Bossert, stripping a man to his bone, having him walk around without any clothes on, who received twenty-one skin graftings, whose body is all torn to pieces, and being slammed around by police.

I do not care whether you gentlemen know some of the police officers or are familiar with 3645
them. I say that htose methods should and must be stopped. That is not American methods of procedure. Do not try to convict people on that kind of testimony, and that is what you have here. Where is Heffernan? Why wasn't he here? He appeared during the course of this trial. We had him excluded from the courtroom at our request because we thought he was going to be a witness here and we wanted to get this evidence in without people listening to what was going on.

Now they give you Detective Bell, Detective-

Lieutenant James McNally and Detective John McNally. All of them give you different versions of how long he was stripped and how long he walked around, and whether he was treated nicely, because Bell said he was being questioned until three o'clock in the morning; until three o'clock on the morning of October 24th, not a bit of testimony here; nothing here to examine and nothing here to give us as to when and where and what he was doing.

Now we have that gentleman John McNally. John McNally says he was only stripped for five minutes. In the name of God, why don't those fellows get together? Why don't they get together when they want to pull something like that around here and say whether it was five minutes or eight hours. There is a difference between five minutes and six or seven and eight hours. James McNally or John McNally said he was only stripped for five minutes, and after that he put his shorts on and was walking around. I cannot understand Lieutenant James McNally, a lovely fellow, a nice fellow, he came into this courtroom and said to you gentlemen of the jury when he was brought up to the Hotel Bossert that he was not under arrest. He was not placed under arrest then. Could he go as he pleased? No. Would you let him go if he wanted to go? No. Would you let him telephone to his friends or relatives or some member of the family? No. Would you let him telephone to a lawyer? No.

Well, if you would not let him do that and would not let him telephone to anybody at all, he was under arrest, wasn't he? Well, after

pulling teeth he finally admitted he was under arrest, and John McNally said he placed him under arrest. Bell told us he placed him under arrest.

Let me continue. I am going to brush over it as fast as I can so I can go through with this in the time required.

Now Detective Charles Celano; you saw that man on the witness-stand, that big fat cop here, 18 years in the Homicide Squad. Well, in the eighteen years on the Homicide Squad, he prob- 3650
ably has not yet learned about testifying in corroboration of his brother officers. He got it balled up altogether. His testimony you will remember, but he did say that he made a statement on the 25th. He did say that he made a statement on October 26th at the Bath Beach Police Station. He said that he was there when it was taken. Then he said another statement was taken on October 27th but he did not know when it was taken, and in any event until I finally showed him it was taken at 2:10 a. m., and he finally did not remember anything. 3651

He said he drove home in a car. I said, "Whom did you drive home with?" He did not remember. I said to him facetiously and I did not think he would answer it the way he did, I said, "Do you remember taking Malinsky along?" He said, "I don't remember." He did not remember whether he took Malinsky with him on his way home. That is the kind of testimony you have here.

There is a very significant piece of this testimony that I want you to take with you in your jury room. If Malinsky said he did participate

in this crime; on October 23rd, October 24th, October 25th, October 26th, he was taken to the Meeker Avenue station where they have cars, automobiles, which are stolen automobiles, belonging to different people, either they are called for or have not been called for, but in any event the cars are probably used for the commission of crime; and he was taken over there and when he was taken over there Celano said that there were a lot of cars and he walked right over to
3653 the car. The defendant said he did not walk right over to the car and had not stopped right in front of the car, but Celano said, "There is the car. Try the door knob and see if you can get in." He said the handle was broken or something was the matter with the car.

Then he told you that Mr. Slip told him in Jewish all about the crime, how the crime was committed, and while he was sitting down answering questions to the District Attorney over and over again and to the cops at the Bossert Hotel, Slip was telling him in Jewish, "Say it this
3654 way; say it the other way"; the names you have heard him testify today here on the witness-stand, but the very significant part of this testimony, gentlemen, is this, if he voluntarily confessed to the commission of this crime on October 23rd, October 24th, October 25th and October 26th, when he went over to look at that car, why did he take a handkerchief out of his hands and why did he try the handle of that car with it? What difference does it make whether he left a few fingerprints on there or not? According to the police he already made a voluntary confession, according to the District Attorney and according to

everybody, he already admitted his guilt and participation in this crime.

These little things are very important. Why did he take that handkerchief and put it on the handle of the car?

The defendant gives you an answer which is the answer which spells his innocence. He says to Celano, and Celano says so here, that the defendant said, "I am putting my handkerchief on the car so that I don't want my fingerprints on this handle". 3656

And then the defendant further said, "I am innocent. I did not commit this crime and I don't want my fingerprints on this handle".

Fingerprints never lie. No two fingerprints in the world are alike and an expert could tell you that; and if his fingerprints were on the handle of the car, it would spell his doom without any difficulty, without any trouble, confession or no confession, the fingerprints in and of themselves would be sufficient to convict him for any crime on earth. Isn't that the absolute working of an innocent man? 3657

That confession must and should be thrown right out, and that should go out with the balance of the testimony. Now gentlemen—

The Court: You have approximately seventeen minutes left. I will make it twenty minutes.

Mr. Solovei (continuing): I am coming to Mr. Eisler' testimony, that is Red Tippler. He is now in the Service. He has been in since January 20, 1941. He said he knew Malinsky for about three years and he had a conversation with him at the Citadel Club in the latter part and sometime in December 1940. He said that Malinsky

gave him a ticket for a package in the subway, to get it in the subway from a stand.

Now he said from a stand in the subway in the vicinity of 42nd Street, but where the subway was located, he don't know; it is 42nd Street. "Was it Grand Central Station?" "I don't know." "Was it on 42nd Street and Broadway?" "I don't know." "Was it a cigar store?" "I don't know. It was a stand in the subway." Just like a fellow telling him to find an individual who lives at "No.
3659 1 New York". Go try and find him. He said in the subway; and he got this package and he said it was wrapped in stockings. He says he knows Slip for about four years and knows Yellin all his life; always lived on the East Side and now lives in Brownsville prior to him going into the Army. At that time he was not working. He visited the Club and he played cards at the Club and he was out of employment in December 1940; had no other visible means of support other than the money that he makes from working and he did not work at that time, and he had no money
3660 and he had trouble supporting himself. He never told anybody about the package. He never told anybody that he got a package for the defendant Malinsky and he did not know what was in the package.

Now all of a sudden when he gets back to the Citadel Club this defendant opens the package and he exhiibts to him two .38's and two .38 throwers, or something like that, making four guns in all. He was practically a stranger on December 1940, and he said this defendant was the one who did that.

Now he said he came down from where he was

up in the State of Washington on June 12th. He saw Slip at the District Attorney's office and they had lunch together on June 12th; and he was at the District Attorney's office from 10 a. m. to 3 p. m. On June 15th, he again saw Slip; that neither Slip nor Yellin asked Eisler what he was doing at the District Attorney's office. Now isn't that funny? Isn't that strange? Here is a great friend of Slip's, or a friend of his anyhow, a friend of Yellin's coming down from Spokane, Washington, traveling several thousand miles, 3662
and he did not talk to Slip or Yellin in the District Attorney's office, and he also said that he knew Beitler all his life, this Mr. Eisler.

At page 374 of the record I asked him:

"Q. Did Spielfogel tell you he was testifying in this case? A. No, sir.

"Q. Not a word at all about his testimony? A. No, sir.

"Q. You did not ask him what he was doing down here? A. Didn't ask him anything.

"Q. Did not ask Yellin what he was doing? A. Didn't ask him anything. 366

"Q. They did not ask you what you were doing down here? A. No, sir."

Now they went out together while they were here. They went out and had lunch together and they spoke to each other.

Slip testified that he saw Eisler at the Citadel Club in December 1940. He saw him at the Citadel Club. Now if there is any question in your mind, come back here and refresh your memory. He saw him at the Citadel Club in December 1940 and that is the time, about the time when Mr.

Eisler said he got the package which contained the guns.

Now let me show you something. He said he go it from a stand. Now let me show you that Slip knew more about it than Eisler. Slip says he got this package from a locker where you check packages. That is where he got this package. Eisler did not know where he got it but Slip knew where he got it. Slip was the boy who knew where he got it, all right.

3665 Eisler said he got it in the subway from a stand. Now let me show you how Slip knew more about this package than even Eisler himself. Now how are you going to arrive at the truth when you go to check up on these contemptible perjurers here and see whether they are telling the truth.

This Red Tippler, a friend of Beitler's; knew him all his life, and knew Yellin for a number of years and knows Slip for so many years, I don't care what their station in life may be or who they may be, whether at the present time he is in uniform or not; he is only in uniform because he has got to be in uniform.

3666 The Court: You have ten more minutes, Mr. Solovei. Will you please close at that time?

Mr. Solovei (continuing): I am now reading from page 215 of the record:

"Q. 'Red the Tippler' got out of the locker up town? A. Out of the checking place where you check baggage.

"Q. Do you know 'Red the Tippler'? A. I do.

"Q. What is his right name? A. I believe it is Eisler.

"Q. Eisler? A. That is right.

3667

"Q. Was anything said as to the make of the guns? A. Yes."

He got the package from a checking place where you check baggage. Spielfogel said that; and Spielfogel saw him and met him at the Citadel Club the same time, December 1940, that Red the Tippler said he was there.

Now I am not making any of this stuff up. I am taking this as it goes along right from the record here as the people testified and I am trying to show you gentlemen that from the discrepancies in this testimony here, there is so much perjury involved that you cannot possibly take that kind of testimony and you cannot convict a man on this kind of testimony, if your oath of office means anything at all and I know it means plenty because I know you are all high-class law-abiding citizens and gentlemen who are going to do the right thing.

3668

Now I will come to Peter Shamin's testimony. I will tell you now if there was a terrible disgraceful thing that ever happened, it is Peter Shamin. Putting a young boy on the stand like that and having him testify like he did. That kid did not know anything at all about the case. He never knew about the case. He was sitting there shaking like a leaf. He was in jail and scared of going back to jail. The idea of putting a kid like that, 18 years, in City Prison for nothing at all and no reason at all.

3669

Why just remember, when he worked in Rouch's store, he was only a little over 16 years of age; only 16 years of age. Now, I did not ask him this; the Judge asked him this question: "When was it, the beginning or end of the month, or the

3670 middle of the month? A. It must have been about the beginning of the month because I remember the school term had just begun." The Judge asked him that question. Nobody tried to trap him; the school term had just begun.

Now that was when he testified the first time. He came back on the 22nd day of June of this year and he again testified that it was the early part of February 1941 when he says he got some sort of a package which he never in his life got.

3671 He said he made a statement on April 4th at about 7:30 p. m. I am only going to show you this sort of testimony and I am just comparing it to show you gentlemen how could you believe anything like this? If a boy don't know when he was in the District Attorney's office this year, in April 1943, how in the world could he remember what happened in 1941? He says he was there April 4, 1943, and he made a statement.

He never was there and never made a statement on April 4, 1943, because the statement that I read from shows that he made it on March 23,

3672 1943, and then he says some guard by the name of Al, I don't know what in the name of—what in heaven's name ever prompted him to say anything like that—by what right or what authority anybody who walks with him from here to the Jail has the right to discuss the case with him and tell him he made a mistake—and he says some guard spoke to him and said, "You made a mistake".

Why should anybody have to talk to him and tell him he made a mistake if he knew what happened? Why did anybody have to take it up with him if he knew what happened? Because

he did not know what happened. Nothing like that happened. There are two birthdays in February; one of my colleagues brought that out. There is Lincoln's Birthday and Washington's Birthday. Couldn't he say it was in between Lincoln's and Washington's Birthday, and that is the reason why he remembers it? That would be something to hang your hat on. He studied history and went to school. He never mentioned Lincoln's Birthday or Washington's Birthday.

He said to you gentlemen here that he made a 3674
statement. I will just show you something else. He said he made a statement on Monday, March 23, 1943; Monday, March the 23rd. He said he made a statement on Monday, March 23, 1943; Monday, March 23rd. March 23, 1943;—Gentlemen, look at your calendars when you go into your jury room; is on a Tuesday. Now I am only giving that to you to compare these things. How in the world could he remember what happened.

And then he said that Malinsky was in the store, Malinsky was in the store from 1:45 to 3675
7 p. m. He was in the store from 1:45 to 7 p. m.; that is what he said.

On page 102, talking about Malinsky being in the store he said:

"Q. From 1:45 until 7 o'clock, did you see Malinsky around that store? A. Yes.

"Q. Was he in the store? A. Yes."

Now how could he be in the store at that hour and the way he testified to, when the records here, the documentary proof by the Parole Officer, I am just giving you this and taking it for what it is worth, the Parole Officer of the State

of New York was here and he reads from a report here in writing and he said that Malinsky on February 15, 1941, at 5:52 p. m., at 5:50 p. m. or 5:52 p. m. was at the Parole Office at 80 Centre Street, where he reported on his parole. Was he there at the store from 1:45 until 7 p. m.? He could not have been. He must have been at the Parole Board because the records, the documentary proof here, brought here by the People of the State of New York,
3677 under subpoena, show that he was not there.

Now I want to—

The Court: When do you propose to close, Mr. Solovei? Your time is within two minutes.

Mr. Solovei: Will your Honor just give me fifteen minutes more?

The Court: No, I will not. I will not give you fifteen minutes. I will tell you what I will do; I will give you an hour more, or I will give you as much time as you like. You can take the rest of the afternoon but I am going to allow the District Attorney to sum up tomorrow morning unless you keep within your time. That
3678 will be the rule, either finish within the time that was allotted to you, which the Court deems ample, or if you wish, you can have the balance of the afternoon, but I will let the District Attorney sum up tomorrow morning. Which do you want?

Mr. Solovei: Your Honor is running—

Mr. Morritt: Can I speak to Mr. Solovei?

The Court: Please sit down. I am addressing Mr. Solovei.

Mr. Solovei: I feel—

The Court: Are you counsel for his client?

Mr. Morritt: No.

The Court: Then please sit down.

Mr. Morritt: I would like to speak to him one second.

The Court: If he wishes to speak to you he will speak to you. Sit down, please. Mr. Solovei, which do you want to do? Do you want to continue on for as long as you like. I am not going to stop you but if you run for another five minutes, I am not going to have this District Attorney start in to sum up at a late hour 3680 for the jury when they will be tired and when they are eager to get back to their hotel and to take a shower in this sweltering day. Which do you want?

Mr. Solovei: I am going to try to finish this argument as quick as I possibly can.

The Court: That does not interest me. Which do you want? Do you want to stop within the time allotted to you?

Mr. Solovei: I cannot stop.

The Court: So that you want to continue on.

Mr. Solovei: There are certain witnesses— 3681

The Court: Do you want to continue?

Mr. Solovei: Yes, I want to continue.

The Court: Proceed.

Mr. Solovei (continuing): Gentlemen, I regret very much that I must continue on in justice to my client, and I feel that I must do it because I have not completed the testimony here and I have got a duty to perform and I am going to try to do it to the best of my ability, and I will ask you gentlemen to please bear with me.

The Court: Mr. Solovei, Mr. Morritt has in-

dicated that he wanted to speak to you. You may confer with him at this time.

Mr. Morritt: Thank you very much, your Honor.

(Mr. Solovei confers with Mr. Morritt.)

Mr. Morritt: Thank you, your Honor.

Mr. Solovei (continuing): Now I am going to come to Virginia Goonan's testimony. She said on her direct testimony here that she was at Shirley's house for about three weeks and
3683 she remembers she was there on February 15, 1941. You heard her testify. To give any credence to her testimony—

The Court: How much longer are you going to be, Mr. Solovei? I am not going to limit you. Tell me, please, how much longer you think you are going to be because if you are going to be summing up for some length of time, I would like to give these men an opportunity to step out for a few moments.

Mr. Solovei: Supposing we do that.

The Court: How long do you expect to take? How much longer?

3684 Mr. Solovei: Well—

The Court: Can't you give me some estimate of the time?

Mr. Solovei: I will probably finish within the hour.

The Court: You want another hour?

Mr. Solovei: That is about all.

The Court: I will give you another hour.

Mr. Solovei: Thank you.

The Court: We will take a recess now, gentlemen. Please do not discuss the case and keep your minds open.

(A short recess was taken after which the trial was continued).

The Court: Proceed, please. I will give you another hour.

Mr. Solovei: I will probably be through before that.

The Court: Will that be enough, an hour?

Mr. Solovei: Sure; thank you very much.

The Court: Proceed.

Mr. Solovei (continuing): Gentlemen, I know 3686
I wanted to call your attention to something that was very important and here I have it. I said to you Yellin, Slip, Kovner and Beitler knew all about this case; knew all about the robbery, and they were the ones that participated in the robbery and I believe them to be absolutely guilty of this crime.

On February 10th, Kovner testified he knew all about this robbery, about the robbery about to take place. Mind you, five days before. I am going to read from page 616 of the record:

"Q. How did you first hear about the rob- 3687
bery? A. I heard about the robbery or the shooting?

"Q. Of the shooting. A. I heard about it from Beitler.

"Q. Pardon me? A. I heard about it from Beitler.

"Q. When did he tell you? A. Told me the same night.

"Q. The same night? A. Call it the morning. I call it the night but it is really morning.

"Q. That is, that night? A. Three o'clock in the morning.

3688 "Q. The early hours of Sunday morning? A. Yes, sir.

"Q. You met him at that time? A. He met me.

"Q. Where? A. In the Embassy Club in Flatbush.

"Q. The Citadel Club? A. The Embassy Club on Flatbush Avenue.

"Q. And it was at that time that he told you that he participated in it? A. Yes, he told me
3689 he shot a cop."

Now the Embassy Club in Flatbush, gentlemen, is right within the limits and a stone's throw from where this crime was committed. Beitler, Kovner, being right in the Borough of Brooklyn within a stone's throw from where the crime was committed. Slip testified here that Beitler and Malinsky took one cab and then another cab and they went to East Houston Street in New York.

Now Kovner comes along and he says he was with Beitler at the Embassy Club in Flatbush. Now just go to your rooms and think that over.
3690 The Embassy Club in Flatbush. What is his name, Kovner, also said that he met Malinsky, and Malinsky said, using the language, I don't know if I called your attention to this but I don't think I did, that he was on the lam, using the expression in the parlance of the thieves, on the lam, meaning that he was hiding from the police. You remember that.

Now the parole officer said he reported to the Parole Board four or five times a month. He worked from the first day he left on January 1940, Elmira Reformatory, up to and including

the day that he was arrested on October 23, 1942; never out of employment except for a couple of weeks or a couple of months that he said he was doing odd jobs, and the last job he had he worked exactly one solid year, from October 1941 until October 1942, making anywheres from $40 to $60 to $70 a week.

Now I say to you gentlemen in all fairness, a man who continuously works like he did, a man who has a good job, who later on got married and lived with his wife, and while he did not 3692
come to live with his child because the child was born while he was in jail on this charge, that man does not go out to do the kind of stickups, the jobs that was done in this case, because those three men, Beitler, Spielfogel, and Yellin, never worked, they were always out of employment; they were always making their livelihood by stickups and they were not using guns, as one of them said, whether it was Yellin or Slip, "We used irons." Irons, he said.

Now we will come to Virginia Goonan. Virginia Goonan said on her direct examination 3693
that on February 15th or the morning of February 16, 1941, there was a knock at the door while she was living at Shirley's house, who is the sister of the defendant, and that she was his girl friend for some time, and the defendant came in and said he shot a cop; said it to Di Pisa and said it to her.

Gentlemen, that story is so farfetched and so unbelievable that a man would deliberately walk into a person's house and brazenly tell her and Di Pisa, with whom he had trouble, whom he had no use for, who had been fighting each other,

because of some marriage between him and his sister, he being of Italian faith and she being of the Jewish faith, and he said he chased her around and knocked her around and he went up there and beat him up for it. She said it was on February 15th and she remembers it. You heard her testify. However her testimony was so unreliable and unbelievable that nobody living could possibly place any credence in it at all. And it seems to me a simple proposition that
3695 from a layman's standpoint and also from a legal standpoint, that when one says it is night and night is day, and one says one way and at the same time says it was the other way, then neither statement is believable because one neutralizes the other and you cannot believe it because you don't know which one to put any credence in, when one neutralizes the other in that manner, there is a reasonable doubt as a matter of law. There could not be anything else.

The Court asked her this question: "When
3696 was it? Was it in January or in February—" I am reading from page 402: "—or in March or in April 1942". I withdraw that. I did not read that question correctly.

"By the Court:

"Q. When was it? Was it in January or in February or in March or in April? A. That was January 15th.

"Q. Was it January 15th? A. That is right.

"The Court: All right." Again:

"By the Court:

"Q. Are you certain it was on January 15th? Are you certain of the month? A. Yes.

"Q. What? A. It should be January.

"Q. It was January; you are sure of the month?"

Then I made an objection. There was a little colloquy between counsel and Court. Then the Court again pressed the question on page 403:

"Q. When was it you went to live at the sis- 3698
ter's house; in January? A. That is right.

"Q. What part of January did you go to live at the sister's house? A. That was before the end of December; toward the end of December, and I stood there for three weeks, and I got out the following Monday."

Now on her direct examination she said it was February 15th. She came here on cross-examination and said it was January 15th in answer to the Judge's question, and in answer to my questions half a dozen times. And then I said to her, "Who told you about February 3699
15th? Did Mr. McGough tell you about February 15th? A. Well, he told me—he told me he wanted to know if I really know what I was up there to his office."

Mr. McGough: What page?

Mr. Solovei: Page 415 of the record.

Mr. McGough: Thank you.

Mr. Solovei (continuing):

"Q. Did he tell you about February 15th, he or Mr. Van Ness? A. They told me that there was a cop shot.

3700 "Q. They told you a cop was shot on a certain date, is that right? A. That is right.

"Q. And do you now remember whether it was February 15th that they told you? A. Yes."

Now there was a witness called here by the defense, not by me, a Mr. Jalkover, or some name like that. He was called on behalf, I think, of Rudish, to show when Rudish was introduced by Yellin to Malinsky, or some introduction in
3701 any event, and they tried to show here that the introduction was had in the spring of 1941. Just as soon as he got through with his testimony, the young man was escorted by an officer, taken to the corner part of the building and there he sat in the same room with Mr. Yellin, with Mr. Kovner I think, and with Mr. Slip Spielfogel and several detectives, in custody, incommunicado, and when he got all through being in that room, having a consultation with those in the room, and whoever else it was that spoke to him, his wits were scared out of him
3702 and he came back and he said it could have been in 1940.

If we had called Virginia Goonan to the witness-stand and in the same breath she said it was February 15th, and two or three minutes later she said it was January 15th, and shortly thereafter she said it was somebody told her to say it, Virginia Goonan would be now seeking a lawyer and a bondsman. She would have been apprehended and arrested and charged with perjury. But that is the District Attorney's witness. The District Attorney's witnesses cannot lie; they never lie. That was perfectly all

right for her to do those things, but when a poor fellow came here, whose testimony meant nothing as far as we are concerned, just an incident of an introduction in the spring of 1941, he was immediately taken into custody.

Now the law cannot be right if it is only with one and not with the other. The law is for everybody, but did not happen in this instance.

Now we have this other distinguished citizen, Pietro Di Pisa. He knew the name of a policeman that was shot on February 15, 1941. Now 3704
I am going to ask you gentlemen a very fair question. I want you to be fair when you go to your jury room and ask yourselves the same question and then answer it. I think out of the fourteen jurors, of course there are only to be twelve that go to the jury room, probably at least ten of you read about this murder in Coney Island; that you knew something about it; you knew a police officer was shot in Coney Island. Just say that I asked you that on your voir dire examination and you told me that you all—I don't know whether all of you but most of you read about it, but you said whatever you read 3705
meant nothing and you forgot about it and you will give him a fair trial. You gentlemen just go to your room and when you deliberate say to yourself, who read about the Fox case? Ask the question amongst yourselves. Who read about the cop being killed in Coney Island? Never mind the Fox case. How many of you jurors remember that the cop's name was Fox? How many of your jurymen, you intelligent men, will remember the name of Fox? Go and answer that question yourself, I read about it. I heard about it and I never remembered the name of Fox no

more than the name was Sullivan or Cohen or any other name. Just think of it; but this very distinguished gentleman here, who spoke with a decided accent, this little Italian gentleman said he knew the policeman's name was Fox. And he knew he read it. And he was positive he read it and he was positive when he read it. There was not any question about that because that highly intelligent gentleman probably don't know how to read or write at all.

3707 I don't know; I did not give him sufficient examination on it, but he read it because he is sure he read it. There cannot be any mistake about it that he read it. And when do you think he read it, according to his own testimony. I don't know if you remember that he said he read it until he was rehabilitated by the District Attorney. You know you get a witness and examine him and knock him down, and you get from him certain parts of the testimony, and then the District Attorney comes along, with his leading questions and puts him on the spot, where he cannot miss, if he has the slightest

3708 degree of intelligence. This gentleman, Di Pisa, told us that his wife kept the newspaper clipping. His wife was not here. His wife did not testify, and his wife did not bring the newspaper clipping, nor did he bring the newspaper clipping. I don't know why but they did not bring it. "Your wife kept the newspaper of "February 15th?" "Yes, sir." "You read the newspaper February 15th, is that it?" "Yes." That is at page 437 of the record:

"Q— is that it? A. Yes.

"Q. And then the newspaper of February

15th, you saw the article in that paper, is that right? A. Yes.

"Q. And that paper you kept, is that right? A. It is my wife got it.

"Q. Your wife kept it? A. Yes, sir.

"Q. And the only paper you saw it in on February 15th was the News, is that right? A. Yes, sir.

"Q. You are sure about that? A. Yes, sir.

"Q. You are positive? A. Positive.

"Q. Cannot be mistaken? A. No, sir." 3710

And then the Judge and the District Attorney both asked him some question and he said something about the funny sheets, and then he remembered it was in the Sunday paper because the funny sheets were in that paper. But he did tell you that the paper was of February 15th and that his wife has got the paper, and neither he nor his wife had the paper here. And neither his wife testified in reference to same and she was not called, and despite that she is a sister of the defendant, it matters not, because if she was called up here to testify, and anything like that did transpire, whether she be the sister or 3711 not the sister, she would have to testify to the truth or otherwise stand the consequences, or at least come to court and say, "I refuse to testify or refuse to be here."

There might be some question in your mind why I did not get her here and I would like to answer that question and I hope that I could answer that intelligently to you people; but it cannot be done and it is not part of the record here and I cannot do it.

The Court: Read that last part to me, Mr. Stenographer.

3712 *Summation on Behalf of Defendant Malinsky*

(The last part of Mr. Solovei's summation commencing with, "There might be some question in your mind," etc. etc., was read to the Court.)

The Court: Go ahead.

Mr. Solovei: Now I just want to call your attention to one more little point and just a few things and I am going to stop here. The defendant Malinsky said they took the Hick Street route along the waterfront down towards Coney
3713 Island. There was some testimony here that they went through the park. Someone said they were pretty sure it was through the park. Some of them did not remember. In any event, he said it was over the Hick Street highway. There was a chauffeur from the District Attorney's office that drove that car. There would not have been any question about how they went over there if that chauffeur were here, who is available and who is employed in the District Attorney's office.

Now this hat has a name in it. The name in that hat, which is People's Exhibit 14 in evidence,
3714 Louis Friedman, Brooklyn, New York, is a well-known haberdasher, and if he was brought here, he could probably testify, if it was possible within his knowledge, as to who bought this hat, the same as this old man Kaye, or whatever his name was, this old waiter here, who could testify that he was in the restaurant seven months before they said he saw Indovino come in the restaurant.

Now may I have your Honor's ruling on the question of one of the jurors placing this hat on the defendant and using his own way of putting it on as to whether or not this hat fits the defendant?

The Court: If the District Attorney had consented, I would have denied the application. Is that clear?

Mr. Solovei: All right.

The Court: Is that clear? Under no power in the law has the Court the right to do what you are asking the Court to do. Proceed and make no more mention of it.

Mr. Solovei: I take exception to your Honor's ruling.

The Court: Proceed. Gentlemen, you will bear 3716
in mind what I have just said, that under no power in the law have I got the right to permit any juror during the summation to do what counsel asked to be done, and you will pay no attention to his argument made upon that application; none whatsoever. You have your exception.

Mr. Solovei: Yes.

The Court: Please proceed.

Mr. Solovei: Gentlemen, I am going to conclude and I just want to call your attention to just a few points here that I have in mind and then I am through. As I said to you before, 3717
gentlemen, this is a case relied upon by the People—

The Court: Excuse another interruption, please.

Mr. Solovei: Yes.

The Court: Of course, if counsel desires to open the case for the purpose of introducing additional evidence, it is always within the discretion of the Court to grant such motion. If you desire to call any additional witnesses that you have not called, or to introduce additional evidence that you have not introduced, it is within the

discretion of the Court upon application of counsel to grant such a motion.

Mr. Solovei: I take exception to your Honor's voluntary statement to me and the question to me at this point.

The Court: Proceed, please.

Mr. Solovei: Now before you can convict this defendant of this crime as alleged in this indictment, you must be satisfied beyond a reasonable doubt that the evidence brought forward in this
3719 case connects the defendant with every material essential fact to constitute the crime, and must connect the defendant with the person who committed it by independent reliable believable proof; and that means, there must be reliable believable independent proof connecting the defendant with Beitler in the commission of this crime.

Now whether he knew Slip or Yellin or any other persons, knowledge, acquaintanceship with each other, gentlemen, is not evidence of the commission of a crime, nor can you use that during your deliberations just because they knew
3720 each other and therefore he must be guilty of the crime.

Now, gentlemen, you must not draw any inference based upon any conjecture or supposition and suggestion, speculation, or upon other inferences. Your conclusion must flow naturally from the facts and be consistent with them all. The proven facts here by the People must exclude to a moral certainty every hypothesis except that of guilt of the offense charged and not alone must all the facts be consistent and point to guilt, but they must be inconsistent with innocence before

you gentlemen could vote for a conviction against this defendant Malinsky or any of them.

Now, gentlemen, I am through. I want again to apologize to you gentlemen for taking up the extra little length of time that I did. If you are peeved about it, I regret it and I must humbly apologize. I did not want to stay here and just burn up my throat and my body unless I thought that I omitted something that I should have called your attention to, and I really honestly thought so because these other witnesses' names 3722
I just brought out and some of their testimony that I touched upon lightly, I did not have an opportunity to do before. You see, while there are three lawyers here, the other two just briefly stated their facts as far as their individual clients were concerned, and I thought it my duty or I would be remiss in doing my duty, if I did not call your attention to all of these terrific important discrepancies in testimony, and the perjurious statements by various witnesses, so if you are going to be peeved, take it out on me. Sometimes when you see me, just tell me that I was 3723
too long or even in the parlance of the day, I was a little bit windy. I could not help it. I did what I thought it was my duty to do as a lawyer for a defendant charged with murder, murder in the first degree. I cannot come back again and talk to you. I cannot answer the District Attorney as you were told.

Now, gentlemen, you must, when you go to your jury room, say to yourself, "Am I satisfied beyond every reasonable doubt that this defendant Malinsky and the other two aided and abetted

Beitler in the commission of this crime as alleged in this indictment?"

I say to you gentlemen from the evidence adduced here there was never a more perjurious case that ever happened in the State or anywheres than you have here. I tell you if I brought forward witnesses like that brought forward here, every one of them would be in jail by this time. Every one of them would be arrested and charged with perjury, and I mean what I say, gentlemen.

3725 You had an example of that poor little fellow who testified here about the mid-summer of 1941, and then they had him change it to the mid-summer of 1940, so it could have been in 1940, and after he testified the way they wanted him to testify, he was then permitted to go home; but up to that time, in he was.

I ask you, gentlemen, to give these defendants every consideration. Go into your jury room and deliberate and just bring out the testimony; remember the Embassy Club; remember the meeting of Beitler and Kovner at the Embassy Club

3726 the day of the murder, three o'clock in the morning when they were there. Remember Slip being around. Remember Yellin being around; all of them being around, and all of them the night of the murder, and remember that Kovner was the very distinguished gentleman who said, "Wherever you see Beitler, then you see Kovner."

You remember he said that on the witness-stand, "Wherever you find Kovner you find Beitler; wherever you find Beitler you find Kovner."

And we find that all right on October 1941 when he was up at the Hotel Abbey, and Mr.

Beitler shot it out with some men, and one of them was shot and killed, and another poor and innocent man shot in the hotel somewheres around over there, while Mr. Beitler and Mr. Kovner were in the hotel uptown framing some kind of a murder, and Beitler and Kovner were always together and they were together on February 15th; Spielfogel, Yellin, Kovner and Beitler; four participants in the Fox murder; four men who have not as yet been indicted; four men who some day will be indicted in spite of their 3728
testimony here. They are not immune. They can be indicted. They did not get any immunity bath and they are not protected by the fact that they testified here, and when that proper time comes, as I said to you gentlemen, just as sure as there is a God above, those four will be tried and maybe some day there will be another Blue Ribbon Jury, and you gentlemen will be selected, and you gentlemen will say, "I cannot sit in this case because I sat in the Malinsky, Rudish and Indovino case and therefore I am disqualified."

But you will have the pleasure of seeing those four murderers on trial for murder, and I ask 3729
you gentlemen to look into the facts and evidence and see if you cannot see it just the way I see it, analyze it all carefully and then see if you cannot come to the conclusion that you are not satisfied beyond a reasonable doubt that these boys are guilty of the crime as charged in this indictment; and if you do and analyze it carefully, there can only be one verdict and that is of Not Guilty, and I hope and trust that will be your verdict, and I again want to thank you gentlemen for your kind consideration and again

humbly apologize for keeping you longer than I thought I would.

The Court: Gentlemen, I am afraid we will have to take a recess until tomorrow morning. No purpose will be served by continuing the summations today. My plan is to permit the District Attorney to sum up tomorrow morning and charge you right after luncheon recess so that you will have the case in your hands at or about 4:30 or thereabouts. In the meantime, do
3731 not discuss the case among yourselves. You have heard me give you this instruction every-time you leave the jury box. You have heard the arguments that have been advanced by counsel for the defense. I do not want it to come back to my ears that any one of you jurors made the slightest comment, either about the evidence or about the addresses of the lawyers. This admonition is not perfunctory. I do not have to impress it upon the minds of you gentlemen being the type of men that you are as to how important it is to heed the instructions of the Court at this time, for if you should violate the
3732 instruction of the Court now and it should be discovered, it may lead to a mistrial, and all of this procedure will have to be gone over again, from start to finish; or if there was a verdict of one kind or another, it might lead to complications after the verdict is rendered. That might also lead to serious consequences to yourselves. Now please obey the instructions of the Court. Do not say a word about this case to any of your colleagues or to anyone else. Just reserve decision and keep your own counsel. Do not permit anybody else to talk to you about this

case or to discuss it in your presence. You still have not heard everything there is to be said. You have not heard the District Attorney's summation. You have not heard the law explained to you, the law that governs this case, which will come from the Judge, not from the lawyers or the District Attorney; therefore be good judges and reserve decision. Do not express or form any opinion as to the guilt or innocence of these defendants on trial or either of them or any of them until I finish my charge on the law 3734 and you are in the sanctity of your jury room. Of course you will refrain from reading anything in the newspapers if there should be an article about the proceedings of this Court therein. Gentlemen, you may retire and we will resume tomorrow morning at ten o'clock. The jury may retire.

(The jury retired from the courtroom.)

The Court: The defendants are remanded.

Recess until 10 a. m., June 24, 1943. 3735

June 23, 1943.

After Recess. Trial Resumed.

(Roll called.)

Mr. Solovei: I move to strike out the alleged confession obtained on the 27th day of October, 1942, on the following grounds:

3736 *Motion to Strike Out*

1. That the confession was not voluntary and that it was made under the influence of fear produced by threats in violation of Section 395 of the Code of Criminal Procedure.

2. That its admission in evidence deprived the defendant Malinsky of due process of law, in violation of the 14th Amendment of the United States Constitution.

3737 3. That its admission in evidence deprived the defendant Malinsky of due process of law in violation of the Constitution of the State of New York.

4. That the evidence shows that the alleged confession obtained on October 27, 1942, at the Bath Beach station house, at 2:10 a.m., was made by the defendant Malinsky under the influence of fear produced by threats.

5. That the evidence shows that the arresting officers failed to take the defendant Morris Ma-
3738 linsky before a magistrate without unnecessary delay, in violation of Section 165 of the Code of Criminal Procedure, and also violated Sections 1841 and 1844 of the Penal Law, by wilfully and wrongfully delaying to take the defendant Morris Malinsky before a magistrate having jurisdiction to take his examination, and wilfully neglecting to perform a duty enjoined by law.

The Court: Motion denied.

Mr. Solovei: Exception.

Summation on Behalf of People 3739

(Mr. McGough summed up to the jury for the People as follows:)

May it please your Honor, my Colleagues at the Bar, Mr. Foreman and gentlemen:

At this time, gentlemen, a very important and perhaps my last duty in this case comes to me.

At the outset and before I start discussing the evidence, I want to say that I appreciate the indulgence of you men here as jurors and I want to thank you for the patience that you have exhibited in the case. 3740 Ordinarily, gentlemen, these cases of murder in the first degree, with special panels, are not tried so late in the season; but as you recall there were some witnesses in this case that had to be brought from outlying States, soldier boys, that perhaps would be unavailable if this case were put over until the Fall. But I know that you will understand and take that as one of those things that happen in the course of an ordinary life. For that reason I say I appreciate your indulgence.

Personally, I have enjoyed trying this case, because I have had as my opponents some outstanding men here in Brooklyn, 3741 some of whom I have known for a good many years. I have especial reference to Bill Geoghan, my friend, to Julian Carabba and Abraham Multer, all of whom have opposed me in other homicide cases in this county.

Gentlemen, this is a serious case, and I am a young man, and I would not vote to find these men guilty of murder in the first degree unless I was positive of their guilt beyond a reasonable doubt. And at the time I selected you I inquired into your qualifications, I brought home

742 *Summation on Behalf of People*

to you the importance of the case; and I know that you appreciate that the task is a serious one and the duty imposed upon you is an important one. I asked you would you take the law from his Honor and you promised me that you would; you promised me that you would decide this case fairly and squarely on the evidence, on the testimony as it came from the witnesses, and on nothing else, and you would render a verdict that would square with each of your consciences
43 as men, regardless of whom it hurts or how it hurts. Your verdict, whatever it is, I will have no quarrel with it. I have no personal interest in the case myself; I am merely standing before you as a public servant giving you the facts in the case as have been handled and developed by the Police Department, and then submitted to our office and to the Grand Jury.

Now, within a very short time, possibly late this afternoon, the case will pass to you gentlemen, and the burden will shift, if I may use that legal term, from the Police Department and the District Attorney's office on to your shoulders,
4 and I know that after you hear the Judge's charge you are going to go into that jury room and look for the truth in the case; because I agree with Mr. Geoghan, as he says, that if you find the truth in this case you will have no trouble in arriving at a true and perfect verdict.

It is not a hard case, gentlemen. You have heard counsel say much about these men that I brought here in behalf of the People. I will enumerate them: Yellin, Spielfogel and Kovner. Counsel have said that they are rats, thieves, holdup men, murderers. I agree with them, and

I will tell you that no matter what they call them it would not describe them perfectly in my estimation. I will grant that they are everything they said they were. But I will ask you this question: Who were the friends and pals of these three fellows? No one other than those three defendants sitting right there. The question has been asked here: Would you commit perjury to save yourselves? I did not jump up. I did not make any objection. But everybody here in this court-room, and even some of you 3746
gentlemen know that there is nobody can help those three men outside of the Governor of this State, once they are sentenced and start that sentence. Nobody can change that sentence. So dismiss from your mind any innuendo or suggestion or inference that these men are going to gain by their testimony here. You heard them say themselves that the first time they came down they did not want to tell the truth; they wanted to adhere to the code of the underworld, "Never talk. The thief or criminal who serves time, and who talks, is a rat." They did not 3747
want to talk. McNally didn't even get the tip-off from Spielfogel. But one day up there in Sing Sing prison a young holdup man, 19 years old, from this very court, a young Norwegian named Lauridsen, convicted in this particular court before Judge Leibowitz, of robbery in the first degree, armed—

Mr. Solovei: Object to that statement. It is not the evidence. There is no evidence in this trial record.

The Court: As I recall the evidence, and if I am wrong, you gentlemen will correct me, it was

3748 brought out by counsel on cross-examination that while Spielfogel was up in Sing Sing he spoke about some of the details of this crime to a prisoner whom he described as a kid named Kurt Lawrence or Lorentzen. Now, isn't that the evidence, gentlemen?

Mr. Solovei: He did not say that. He said that Lieutenant McNally got some information from somebody by the name of Kurt Lawrence. No Kurt Lawrence—no Kurt Lawrence testi-
3749 fied to any such statement.

The Court: Perhaps the District Attorney exceeded the bounds of propriety, but there is evidence by somebody other than the alleged conspirators or those that had anything to do either actually or merely had information about the Fox killing, received some information from—

Mr. Solovei: Spielfogel.

The Court: Spielfogel—while they were up in Sing Sing; and that is that young prisoner described as "the kid" by Spielfogel.

Mr. Carabba: Will your Honor take note that
3750 your Honor did not permit any conversation between Spielfogel and this so-called young kid. Your Honor excluded any statement.

The Court: Mr. Carabba, the lawyer or lawyers for the defendant or defendants brought that out. When Spielfogel was asked on cross-examination whether he spoke to anybody about the case while up in Sing Sing, it is my impression (although the jury will be guided by its own recollection of the testimony) Spielfogel said that while up in Sing Sing, about four or six months after he was sent there from New

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York, he did mention some of the matters concerning the Fox case.

Mr. Carabba: But your Honor did not admit into evidence here the conversation between Spielfogel and this Lawrence, the so-called kid. It is no part of the evidence in this case.

The Court: The testimony stopped at that point, and counsel did not inquire from Spielfogel what he did say to Kurt Lawrence. In other words, the details of the conversation were not gone into; but that Spielfogel did talk to 3752
Lawrence about some of the things connected with the Fox case, that was brought out by the lawyer or lawyers for the defendants. Proceed, Mr. District Attorney.

Mr. Multer: May I have an objection on the record in behalf of the defendant Indovino? The defendant Indovino objects to any statement or reference to any statement made by or to Mr. Kurt Lawrence.

Mr. McGough: As I was saying, if you have any idea from his testimony here—and by the way as has been mentioned by my good friend 3753
Mr. Carabba, anything the lawyers say in this case is not evidence—if I misquote the evidence and it is different from what you remember it is, disregard what I say the evidence is; that is the law his Honor will tell you. But my recollection of it is, gentlemen, when he was asked, "Did you ever speak to anybody up at Sing Sing about this case," he said, "Yes; to Kurt Lauridsen." There is no evidence in here about the conversation between Spielfogel and Loritsen. It would not be admissible; it is hearsay; it was not in the presence of these three defend-

3754 ants. And I am only bringing legal, competent evidence in here against the three of them. But there is testimony in here that he first spoke to Loritsen. Somehow McNally went up to Sing Sing and interviewed Spielfogel, not once, not twice, not three times, but a number of times. Finally he was brought down to the Bossert, and finally after a little persuasion and a little coaxing he came out with the story. So they went out and they picked up Malinsky.

3755 Now, gentlemen, why did they take Malinsky down to the Bossert instead of to a jail or to a nearby precinct? That shows the good judgment of Lieutenant McNally. He knew very well that some day this case would land here in the County Court. He knew that twelve strange men who did not know anything about the case would sit in judgment on whomever was charged with this crime. Do you think that he wanted to spoil the case against anybody that he was going to charge with the crime, by taking him right up to the back room of a police station?

3756 Or did he use good judgment by taking them down to the Bossert? A perfect defense to anything such as has been raised here by Malinsky! If you think this fellow was touched in any way, send him home, acquit him; because no such thing happened in the case. There is not a shred of evidence to back up his statement that he was beaten. Do you think McNally would beat a confession out of him and then come in here and have you men say: "Why, it happened down in the police station! They must have done it! The fellow's stomach or chest is all damaged—21 skin graftings!" What has

21 skin graftings or anything else got to do with this case? What has lifting the shirt up in this court-room got to do with beating him? They would like you to say the police did that to his chest.

McNally took him down to the Bossert so that if he came in here and said, "I was beaten" I could get up and say to you: "Where is the best place to beat a prisoner? In a police station, where the foundations are so thick that nobody outside could hear the screams, nobody except the policemen in the station house could hear the screams or could call for aid; or take him down to a hotel, where the place was not built with thick walls, where we have paper walls, where if you raised your voice, why the people in the next room could hear?" Isn't that why McNally went down there? Of course they talked to him for ten or twelve hours. They would talk to him if necessary for sixty hours. Lay a hand on him? Not on your life! Spoil a good case? They had their information; they had their investigations. They knew whom they wanted: this fellow here, who went over to the East Side and told everybody, "I killed the cop." He was not hard to break. And if he was beaten into a confession why were not the other two beaten into a confession? What is sauce for the goose is sauce for the gander. If anything happened down in the Bossert, or if he was harmed, the manager and every guest in that particular building would be up there looking to see what was happening. They brought the man down to the Bossert. Later on they had information to go out on and do

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some more investigating. Yellin was brought down. Malinsky was held and he was allowed to sleep there. He could not get away. When McNally was asked, "Did you place him under arrest?" he probably meant he did not book him right away. They hold men for several days. Are you satisfied with that? They are not going to let him go home, or let him get hold of a smart mouthpiece to preach about his rights and sue out writs. You want a District
3761 Attorney in this county that is worth his salt, not a powderpuff District Attorney. When you are trying a case of murder, especially murder of a police officer, you don't go over and give him a pat on the back and say, "Do you want anything? Do you want to have your lawyer or your wife or somebody else?" In fact after that they would not even let him see Mr. Math, an assistant in our office; they would not even let him talk to a rabbi. Do you think McNally, 17 years in the Police Department, is going to let this jerk from the East Side tell him his
3762 business. They held him there and then they went up and got Yellin. In due course of time they took him down and he reenacted the crime. Did they let him go? No. Did they take a question and answer statement from him yet? No. They sent him out to the police garage on Meeker Avenue, that bridge that has about five blocks under it, where there are hundreds of cars there. You remember Celano saying, "Go ahead, walk through and see if you pick the car out." He himself picked the car out. In his statement he tells you how he recognized the car. Do you think Spielfogel was next to

him then, telling him what to say? It is ridiculous! It is absurd! But he came back and after he came back from Meeker Avenue, they went down to the 62nd squad, the Bath Beach station, pretty close to where this occurred (McNally's post was down there) at about two in the morning, and took his statement. Now, Mr. Hefferman was available to them as well as to us. Anybody in this case, any lawyer in this case has the same power of subpoena I have. If he cannot get Hefferman here, all he has to 3764
do is to tell the Judge, "I ask your Honor to direct a bailiff to go over and summarily take him out of his office and bring him over here and make him testify." Then he said that this was my witness only. I say where is he? I ask him also, "Where is Shirley DiPisa?"

Mr. Solovei: I take an objection.

The Court: Please be seated.

Mr. Solovei: May I note my objection?

The Court: Your objection is noted; your objection is overruled; you have an exception.

Mr. Solovei: Exception.

Mr. McGough: Do you think Edward Hefferman (who was in that office long before I set 3765
foot in there) is asking these questions from a man who is going to say he was beaten? That is the way he is looking at it. I see he is sitting there. Does he look like anyone who has been beaten? That lawyer can go out on the corner now in a hurry and say, "I saw McGough kick him in the teeth," but what he says is not the truth, not unless you prove it. Hefferman said, "Are you making this statement voluntarily?" Smart assistant! He was in the investigating

division, serving his county at all hours. 2:10 in the morning he was there, and if the police treated him roughly in there why didn't he speak up then, if he was beaten. He admits he made no complaints to the jail doctors. Those jail doctors are not down there to protect him. They are down there to protect themselves, and if a man comes in with any marks on him they make a note of it so the city won't be sued. Why didn't he subpoena the jail doctors' records, if there was any such thing as marks on him? When he was arraigned downstairs in the Felony Court he stood up before the magistrate. Did he make a protest to the magistrate and say then, "I was beaten, and I insist that you examine me now"? Not a word! Any evidence in this case coming from Malinsky that he was beaten, is bunk and rubbish; but if you believe he was beaten and you want to kick that confession out, put it aside. There is so much evidence here against him that you do not even need the confession. The evidence against him is overwhelming, gentlemen.

There were some witnesses called here, gentlemen. I will run through them very briefly.

The first man was the brother of the deceased, Henry Fox. He merely supplied what is called the technical proof of the corpus delicti. You have to prove that somebody died. You have to prove that by direct proof. Henry Fox saw his dead brother's body and he identified it to the Medical Examiner, Dr. Marten, who is the next witness. He said there were two bullet wounds, one a through-and-through shot; the other bullet was left in the body and lodged, I believe, in the

posterior portion of his abdomen. That bullet was recovered, a .38 calibre bullet. We don't know the calibre of the first one, gentlemen, but it was in the winter time and it went through a big heavy police overcoat, through a sweater and through the clothing and out the back. You can draw your own deductions. That bullet was never recovered.

The next witness was the engineer from the Police Department. He was merely called to introduce in evidence the blueprint or sketch. 3770

The next witness after him was Herman Dolinsky. He is a very fortunate man he is here today. He says he remembers the 15th day of February, 1941. It was a Saturday. He had counted out $770 in currency, seven hundred in bills and seventy dollars in silver; the silver being in rolls of quarters, ten dollars to a roll and seven rolls in all.

He said he took the money in a bag down to the bank, with Patrolman Fox, whom he had known for several years. He said that the cop was in uniform. He described how the policeman 3771
was on the inside and walking along the north side of Surf Avenue. The hour was about eleven on that particular night. As they approached this particular corner he observed an automobile which was parked a little bit away from the curb. The lights of the car were out. He said it was a small car with a cloth top, and he did later on identify the photo of the car. He says that as they were there on the corner a man leaped out of the car. There was some argument made here that he said there was only one man. There is other testimony by Malinsky that several men

3772 jumped out. Those little variances, gentlemen, I say, should convince you of the sincerity and accuracy of the People's case.

Dolinsky, who was there at the scene, was shoved. Just imagine his state of mind at that time! He says he saw one. Does that preclude that there was more than one that jumped out? Couldn't I have gotten Dolinsky in a room with all these other fellows and say, "Now, listen. Agree on the story here." I swear I would not

3773 do that.

Dolinsky says he saw one: that is what he saw. He came in here and he testified to it. Of course, when he was being shoved, if somebody is in back of him he is not supposed to see that. He just tells what happened to Fox. He says a man rushed up to the policeman and he heard three shots; he saw the policeman go down and fall on his back. The man that was next to Fox was very close to him. He saw Fox whip out his revolver and fire what he said was six shots. Just imagine! Down there on that bleak, winter's

3774 night, Patrolman Fox trying to do his duty in the face of these hoodlums who were out there in Coney Island from the lower east side of Manhattan, where your life is not worth a pretzel! He fired six shots. The accuracy with which he did it is reflected in the picture, when you see one ricochet mark on the side of the hood and the other one through the fender. It is a pity he could not have put them through the back of the car and perhaps killed off some of them who are now sitting here at this particular trial.

Dolinsky says that as he was running down the block he heard a man say, "Drop the bag or I

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will drop you." I don't know whether that was Beitler; I don't know whether it was Malinsky; but after what they did to the cop (and I have a witness here who testified to powder burns—that is how close they were) you can imagine what would have happened to Dolinsky if he did not drop the bag. Dolinsky did what he was told. And at that moment the robbers took the sum of $770, and it was never returned.

He said he could not recognize the men, which was reasonable. It was a dark night and there were dim-out conditions.

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He testified with a little detail as to what happened to Fox, being taken off to the hospital. Later on that night he saw the automobile and identified it.

The next witness after him, gentlemen, was Max Kallman. Now some of the lawyers made mention of the fact, "I don't know why this witness was here or that witness was here." I brought in all the witnesses to bring out the details. This particular witness was brought here because he was pretty close to the scene. He was the one who drove down and notified the two patrolmen, Rabbitt and Lieutenant Bremeier, that something happened. He says he remembers that night. He was on his way with his wife to that restaurant, after having attended a movie at Nostrand and Kings Highway. He said that as he stopped at that corner, which is a street having a traffic light, he heard shots, first two, then more later—he says six more. He said he got out of the car, saw some flashes and just then he saw a car dash across Surf Avenue. He says it was about 25 feet from him. He described the car as a cloth

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3778 top car, either a greenish or bluish car. The lights were out. He said he got back in the car and went down to the theater, which was two blocks away, towards Sea Gate. He spoke to some officers, whom he identified here in the court-room. After he spoke to them they turned around and they went back and he followed them. He too identified the picture of the car. He said his wife was in his car. He said his wife has a very small baby at home, who is sick. I did not think it
3779 was necessary to bring her in.

The next witness, gentlemen, was the officer, Patrolman Rabbitt. I called him in because he was the first policeman on the scene. He testified substantially as I have stated in reference to Kallman's testimony. He said that he was approached there at that corner and he turned around and when he went back he saw his brother officer, from the same house, lying on his back. He said he was unable to talk. He marked in the photograph the exact point, in front of Dr. Bluestone's office, where the body was. He saw the
3780 policeman's coat. He said that he took Patrolman Fox to the hospital.

The next witness was Lieutenant Bremeier. He testified substantially the same. He saw Fox on his back. He helped Patrolman Rabbitt put the wounded officer in the car, and saw him drive off. He said he stood there until the detectives arrived; and you may know that when the detectives arrive the uniformed men are allowed to go.

The next witness, gentlemen, was Patrolman George Corboy. He said he is 21 years in the Police Department. He was the one who testified

he found the car and also found the hat that is marked in evidence in this case—a very important piece of evidence. Did you see the hat on this defendant Malinsky when he was on the stand? Counsel says it does not fit him. You are the judges of that. If that was not a perfect fit, I will eat the hat in Macy's window or any other place. I don't even care whether it fitted him or not. If he got it from Levine and left it behind, at the scene, I say that is a very important and damaging piece of evidence against him. Corboy 3782
said he remembered hearing that Fox was killed. He had in mind a cloth covered car. He was on his way from West 32nd Street after leaving some friends, drove along Mermaid Avenue and turned left into Stillwell. As he was approaching Neptune, he said he spotted a car in front of 2844 Stillwell Avenue. He went over and looked in the car and saw the ignition was jumped—another damaging piece of evidence. Who is the auto mechanic who would know how to jump ignitions? Where is the auto mechanic in this case? The defendant in the middle seat, Sidney Rudish. In 3783
his own testimony he said he was an auto mechanic. He said at 7th Street right off Avenue D he ran a place known as Jake's Auto Repair.

Corboy stated he called the house and went right back to the scene, which is a few minutes from where the 'phone was. He said he found the hat. He held that hat in his possession until Detective Basch came along and he turned the hat over to Basch, and Basch, as you recall, testified he preserved it ever since by marking his initials E. B. in the band of the hat.

Corboy testified that the plates both on the

front and rear of the car, plates No. 6-Q-5923, were bent. He said he met Glodowsky and Windheim and brought them to the police station. He also identified the photo of the car when I showed it to him.

Then we have Corporal Benjamin Glodowsky. I brought him here from Camp Hood, Texas. He was there with his friend Windheim, who is now at sea in the Navy. He said he heard several shots, then about five or six more. They were
3785 about passing West 12th Street on their way to their homes after attending a party. When they heard the shots they turned around and started to run towards the corner, the corner near the bank there, and as they did they saw a car shoot across Surf Avenue. That car, he said, was one with a cloth top, going very fast. He said although he was about 20 yards away he was unable to find out how many men were in that car or what they looked like. He agreed, too, that the lights on the car were out. He said the car was going so fast he could not see anybody. I think
3786 he is telling the truth.

He said he saw Dolinsky and he had a talk with him. Then he said he went in and telephoned to the policemen. He too identified a photo of the car that was subsequently found on Stillwell Avenue.

And I called a young man 27 years old, named Julius Gimbel, who underwent much cross-examination here. Julius said he was down there with two girls, one of whom is now his wife. He said he was on the corner, which would be, if I am correct, across here on the northwest. He said he heard some shots, he saw some flashes, about

seven shots and quite a few flashes. He saw a car rush by. The car was only 15 feet away from him. He said he saw three men in the car. That corroborates Spielfogel; it corroborates Yellin. Three men were in the car. He is not able to identify them, but he said the man in the back was a thin fellow and he was crouched down, and his hair was very slicked. Take a look at the fellow I say was in the back there, that fellow Malinsky—hair slicked down—crouched there in the back. It corroborates his own confession that 3788 he was crouched down in the back.

Gimbel said the men in the front seemed to be short men. From the way they were sitting he said they could not be very tall. Take a look at Rudish. What do you figure his height is, as you saw him walk up here and take the stand? Five feet four? Certainly not more than five feet five.

Gimbel said he heard a man yell, "Help!" He ran across the street and he saw Dolinsky there. He saw the patrolman in uniform lying on the sidewalk. He went over to him and adjusted his hat and opened his overcoat. He too, 3789 gentlemen, identified this car that was down in Stillwell Avenue.

I think it was Mr. Geoghan who said, "I don't know why some of these soldiers were brought in." I brought in young August Hollingsworth, all the way from Kansas, just to testify that the car that was used in this case was his, and that it was left at the corner of Pine and Fulton Streets, where he did not find it, and the inference is plain that the car was stolen. I brought him in because if I did not have him here there

3790 would be no proof that the automobile was stolen. Am I to be criticised for bringing witnesses in? My shoulders are broad enough to take all the criticism of everybody in this case. I will bring any witness from anywhere—even Levine from England, if it was possible to find out what hospital he was in; because the District Attorney of this county is charged with prosecuting crime. And when you come to deal with criminals, no expense is too great. Get the
3791 evidence in here and give it to the jury. Nobody will criticise you. Let the jury have what they want, but please give them the wherewithal, give them the tools, give these men a chance to be confronted with the witnesses.

So I brought Hollingsworth from Camp Funston, in Kansas. He told you where he was that night. He told you that at about the hour of nine he parked this car, which was a 1936 Ford. Yellin said that one of these defendants called it an old shillalah. Maybe it was, but it was Hollingsworth's car. He gave you the license number, 6-Q-5923. He last saw the car at nine
3792 o'clock, after he parked it out there, out where he was calling on a friend, Fulton and Pine Streets. He said the ignition was locked. He said that when he saw the car again it was in the early hours of the following day, at Coney Island; and it was not in the same condition. He said the license plates were bent down and there were two bullet marks on the car, and it was covered with fingerprint powder and the wires of the car were shorted when they were found. He said the car was never returned to him. That car, gentlemen, was preserved by the

police as evidence, and it is still out in the police garage at Meeker Avenue.

The next witness was a detective from the Ballistic Bureau. Why was he called here? I will tell you why, Trusch said he examined the overcoat of this patrolman, down at the hospital that night. He said that he found fresh powder burns on the front of this officer's overcoat, and that is important, because it shows that whoever was close to him and fired the shots wanted to kill him; they wanted to cut him right down without 3794
a chance; they did not want him "to draw his piece" as one of these defendants said to Spiefogel. They did not want to take any chances. They pushed the man with the money out of the way, killed the cop, grabbed the money. So that was why Trusch was brought in. The firing was very, very close. I believe he said no more than six inches, no less than four—four to six inches from the officer's body, is where the bullet came from the muzzle.

Then we come to Davie Yellin. Now I hold no brief for any of these people, but I say that 3795
at times they can tell the truth. Yellin did not come into this case of his own volition. Yellin did not write down and tell the District Attorney, "I have some information I would like to peddle." Yellin did not know anything about this case breaking. Yellin came into this case because his pal Rudish thought he would have a good alibi for him. You remember McNally saying that Rudish told him, "Get Yellin. He is up in Sing Sing. He will prove I am innocent." They brought Yellin down and they told him what Rudish said. Then they went to work on Yellin and lo and behold Yellin tells the truth,

3796 *Summation on Behalf of People*

and Rudish is in. That is how Yellin came into this case. They are talking here about manufacturing evidence, and the Sing Sing Employment Agency. Let me tell you something in answer to that. If I could get witnesses up in Sing Sing to frame anybody, why didn't I come down here with a lot of them? Why didn't I come down here with fifteen or twenty?

One of the lawyers here stated—the first one who summed up—that policemen are a wonder-
3797 ful group of men. "In my time I have had a lot of experience with them. They are fine men." However, then in the next breath he said in so many words, some of them were suborners of perjury. At one minute he praises them and then in the next one he demolishes them. Did the police frame anybody? If they were going to frame, why didn't they frame them with an air-tight case? Why didn't they frame them with photographs of them committing the crime? Why didn't they get somebody who should identify them at the scene, give us an eye-witness? Why didn't I do a little framing? Why didn't
3798 I make up a perfect story, instead of having a few discrepancies here; which I say to you shows the merit of the People's case.

I will point out some more variances.

One of these fellows said that Indovino, the fellow who planted the seed of death in this case —had "something soft down on Coney Island that would bring $1,000." Another one said, "I got a good thing in Coney Island, $2500." I could have got them all over in the District Attorney's office and said, "Make no mistakes! There are good lawyers in this case! Including Joe Solovei, high price lawyer from Borough

Hall! We must say the same thing. Let us agree on those things. Solovei will get after you on this; Geoghan will examine you. See that you are perfect now in the facts." It never happened, though. I did not want it. Indovino told one a thousand, and another one 2500. He was hungry for money. He wanted to induce them to go out and get it, because he wanted to get married. In fact he was the one that after this particular crime, came back to Beitler and said, "I need money." I could have said, "Very 3800
well, sit down, and make it either 2500 or a thousand." I did not want to do that. I wanted you to listen to the witnesses.

By the way, did you contrast the People's witnesses with these three liars? When Indovino was testifying, his testimony had such an aroma I thought we were in the cheese store he operated. Now, this chap, he didn't even know where he bought the ring, didn't have a bank account, didn't even know where the ring was repaired. Why? Was he afraid I would send to New York and see how much he paid. Was he afraid I 3801
would find out whether he deposited any money around the 15th of February? Why was he lying so much? He did not even know anybody in the court. He was in the "box" up at Elmira. Do you wonder why Spielfogel was saying, "I would not go on anything that Ginny picked out. Leave me out of it. If he is the tipster, I want no part of it." Why was he in the "box" at Elmira? Because he was a skunk then, and a skunk now; nobody wanted him. He was afraid to go out on this because he told the fellows, "I cannot go out because I am known in Coney Island."

He admitted he went to that theater; but he

denied he was in the S. & H. restaurant, nor in the restaurant on the other side, the "Famous."

This fellow is afraid he will get hooked so he denies everything. Compare his testimony with that of the little unwedded mother here. I hold no brief at any time for her, but I have to hand it to her. She is not as bad as he is. I had to dig into the inner secrets of her life to get that date straight—all about this pregnancy, et cetera. I knew that story, I questioned her in my office
3803 and I made some notes. Contrast the testimony. She radiated sincerity, when she said, "I am not sure—it must be January—no, it must have been February." Finally, she agrees it is February 15th. I say I don't care what particular date she fixed, because the next witness, Peter Di Pisa, rounds it right out. Where is Di Pisa's wife, with her brother on trial for his life? She is not here. This is not an ordinary lawsuit, where he had an accident with somebody, and somebody looking for a few dollars in money damages. This is a very serious case for Morris Malinsky. Where is his sister, Shirley Di Pisa?
3804 The same power and right of subpena available to me and to my office, is available to every one of their attorneys. Where is that girl? Where is that woman?

Mr. Solovei: May I have an objection?

The Court: Overruled.

Mr. Solovei: I except.

Mr. McGough: Was Virginia Goonan telling the truth here? That is for you to say.

Continuing about Yellin, gentlemen, he stated that a few days before the 15th—he is not sure of the date (it may have been on a Wednesday or a Thursday) was on his way home from

the York Gymnasium Equipment Company, in Brooklyn. He was passing a spot down there when he bumped into Beitler, who introduced him to Indovino. He said, "This is Joe Tiger. He has something good at Coney Island."

Now, I have been accused of putting in a little alias here, "Tiger." I had nothing to do with labeling this defendant "Tiger." He went up there on the stand himself and said when he was a boy he used to like "Tiger Rag." I was going to ask him to hum the tune here for us to 3806
see if he really knew it, but it would probably be a waste of time.

Anyway Beitler says, "This is Tiger. He has something good at Coney Island." So Mr. Yellin relates the conversation with "Tiger." "Tiger" says, "it is a motion picture theater at Coney Island. The manager of the house takes the day's receipts to the bank depository. He walks about two block with the cop to the bank. It is just as dead as Kelsey's nuts." Does that impress you as coming from me or from some of the cops, or does that sound like the braggart expressions used by these hoodlums of 3807
the East Side? "It is as dead as Kelsey's nuts, so there won't be any trouble. The cop will give up as quick as anybody. He ain't looking to get killed." "Tiger" says, "I am too well known down there. I can't go." Beitler says, "Will you tell Slip, and see if he wants to go?" Yellin says, "All right", he will give the message. Because that conversation was something continuing along what Indovino said, I was permitted to bring it out. Yellin told Spielfogel that same conversation. Later on, a night or two later, Beitler got hold of Spielfogel and said, "I

did not see you last night. Did Davie give you the message?" "Yes", and then he told us the whole thing again. "Do you want to go out?" Spielfogel says, "Who is the tipster?", "Joe Tiger." And when Beitler said that, Spielfogel said, "I would not go on anything that Ginny knows about." Do you blame him? Maybe if he did go on it there would not be any case, and we would not be here this sweltering, torrid day.

Yellin said he remembers reading of the Fox
3809 shooting the next day in the paper.

Now, with respect to Rudish, he says, that on that particular Saturday night he was playing cards in a candy store at Eighth Street between C and D, the candy store where he lived—the house where he lived. He said Jake called him out. Jake was his pal. What is more natural than to tell a fellow criminal and a pal that you were just out on something? Anything illogical or unreasonable about that? He said, "We just had a narrow escape. We took the manager down at Coney Island. I stole the car in Brooklyn, an old shillalah, but it was the best we could
3810 get." One of the lawyers here, for Rudish, Mr. Carabba, said there is no proof here; that Mr. McGough in his opening failed to tie up Rudish with the car. Here is the proof, the admission of this defendant, Rudish himself. And that is the best type of evidence—an admission—a man who was there admitting he did it. Is there any better proof of that—short of a photograph of him doing it? He said, "I stole the car in Brooklyn. He drove to New York, picked up some others, then he went down to Coney Island." You know the testimony. It is right there in the record. He said that down there in

Coney Island after this particular occurrence, they drove a few blocks, and the car was one that could not go, and they jumped out near the "L" station, the three of them split up, he came back on the subway. He said he met Morris Malinsky and Ebbie Beitler in the Citadel, and he got his cut, "two bills," and you remember the explanation that "two bills" meant $200. He said to Yellin, "I got to duck the 'pieces' ", and he slapped his pockets, which Yellin said were bulging.

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One of the gentlemen here for the defense said, "Who was ducking them besides Malinsky?" I say, gentlemen, Rudish ducked them. There were four "pieces," two 45s, which are pretty big, and two 38s. One of them is not going to do all the ducking; and isn't it logical that they would each have two?

Jake said, "I've got to duck the 'pieces' ", and he slapped his pocket.

Yellin also said that on that Saturday night, before the crime, he saw Morris Malinsky leave the candy store on Eighth Street about 8 p.m., and he had a brown paper package. Of course, 3813 he did not see what was in it. I don't think he knew at that time.

The next witness, gentlemen, you may have wondered why I called him—Louis Sonenblick. He was called only to show he lived in the vicinity of that Brownsville area near Pine and Fulton Streets that night. He said that at that time he lived at 752 Elton Street, and is a manufacturer of weather strips. He knows nothing about this case. He merely supplied that proof. So you would not be grasping in the

dark, so to speak. It backs up Spielfogel's testimony that Rudish asked him about his uncle getting a man a job. And it explains why he was out there; it explains how he came to talk to Rudish on Sunday, when Rudish complained to him, "Where were you yesterday?" "I was out in the ass hole of Brooklyn, and I did not have your uncle's address". That is the only reason he was called in.

Then you have another pal of these defend-
3815 ants, Nathan, Slip, Spielfogel. He says he knows these defendants a long time; Rudish, twelve or fifteen years, Malinsky, 1937, in June, he said; and he knows Indovino from Elmira, where he was in the "box". Spielfogel said that four or five days before the night Fox was killed, Yellin came to him on Seventh Street and he spoke to him. He said he saw Ebbie and Joe Tiger, "They have a message for you. It is a hoist in Coney Island, Loew's Theater." Spielfogel said to him, "I don't want to go out on anything that the Tiger is in on. I don't like the Tiger. The
3816 next night, he testified, Ebbie first telephoned him, and twenty minutes later Beitler came over and spoke to Spielfogel. He said, "I got a soft thing, like taking candy from a baby. It is the Saturday receipts at Loew's. There is to be plenty on it. It is a rooky cop. The cop will give up. Nothing to it." Spielfogel told you here he said, "I don't want no part of it. If it is from the Tiger, count me out." So Ebbie went away. You remember Spielfogel saying, "When I put a gun in my hand, I don't know whether I am coming back; and if I do, I don't want to be worrying later whether a guy is

going to give me up." He would trust Beitler, who was a two-fisted gunman, but he would not trust this defendant Indovino. Only for Indovino he might have gone out on the job.

Does that discredit him in our eyes? Our case was solved only because thieves like these people fall out. "When thieves fall out honest men get their due." And just as Shakespeare said, long, long ago, "Murder will out." It took twenty months for this case to be broken, but it broke right from the inside, right from their pals; be- 3818
cause Indovino was the one that Spielfogel did not trust.

If Spielfogel had gone out on it, the probabilities are this case would never have been solved.

And one of the counsel in this case said, with loud voice and emphasizing it by pounding on the railings here, "Some day you are going to see four men sitting in court." Four men? Four men? Beitler is dead. Is he going to be on trial too? I say, that is absurd and ridiculous. As saying, "Some day Slip and his three uncles are going to be sitting here." What proof 3819
is that in this case? Some day? We are talking here about this case. Here are three defendants. Are they guilty or aren't they? If they are not guilty, send them home, if you think there is any scarcity or lack of evidence; send them out and let me go back to my office. But let me tell you that we have the evidence here. Have the courage of your convictions; sift every witness's testimony and act on it; find out if they have any reason to lie. Find out what peculiar interest any of these witnesses have in the case. The Judge will tell you that these de-

3820 fendants, having testified, are interested witnesses, as a matter of law, interested because they have a very vital concern in the outcome of this case. What difference is it whether they are interested or not? This is the difference. The interested witnesses' testimony must be scrutinized with care and with accuracy, because they are more inclined to lie. What interest do some of the People's witnesses here have, for example, like Peter Di Pisa, his
3821 brother-in-law, like Spielfogel, Yellin and Kovner? What interest have they got in this case? No more interest than mine. After this case is over my salary will go on and I will have other cases. I am not concerned with the case. I have no interest in it. I am just an employee put into the case. These three defendants are interested witnesses and their relatives are interested.

There were some relatives came here and testified. Did you note the uncle or brother-in-law of one of these defendants, going up and saying
3822 he has worked there solidly for three years? Has he got an interest in this case—a relative of one of these defendants? Those are the things, gentlemen, you have to consider and analyze and determine, in the light of everything, whether they are to be believed.

Then there was some conversation between Beitler and Spielfogel. And you remember that they spent hours cross-examining Spielfogel—because it is important to them. They were trying to make Spielfogel an accomplice in the eyes of the law. If he were an accomplice, then there would be no corroboration of his particu-

lar testimony. They wanted Spielfogel to admit the guns in this case were his. You remember Spielfogel saying they were Malinsky's guns—"If you ask him and you get them; you got them." He did not say, "Go up to Malinsky and get our guns." He disowned any knowledge of them. He had his own guns. He was anxious to find out what particular guns they used, and Malinsky told him, "The guns that Red Tiplet got." And I am criticized for bringing Tiplet three thousand miles, from Tacoma, 3824
Washington, and let him go back three thousand miles; but he is important in this case. He corroborates Spielfogel in one of the essential features of this case. Did Malinsky send Tiplet to Grand Central to get those guns? If he did, or that is so, you can find him guilty, you don't even need the confession. Tiplet is a disinterested witness; never arrested or convicted. Somebody had the nerve to say he had to go in the Army. I don't care whether he had to go in. The fact is he stated that just about a month before, as he said here, "sometime in the latter part of De- 3825
cember of 1940" that he was sent up and got the package; that he really saw two 38s and two fountain pen guns, along with some other things wrapped in stockings, down at the Citadel Club. This is an important particular. That is why I say these witnesses are important. They back up Yellin, Kovner and Spielfogel. So I paid his expenses and had him brought on. I wrote to the Army and brought him here, and now he is going back. If I am to be criticized for getting these soldier boys train rides, then I will take the criticism.

Spielfogel said that on the night of the shooting, about 1:30 or 2:00 o'clock, Malinsky came to his house and he said "We had a shooting match. That donkey went down like a ton of bricks". Can you imagine such a disgusting thing? Killing a patrolman in line of his duty, down in the dead of Winter, and coming back and saying, "That donkey went down like a ton of bricks!" I guess he thought he hit a Sullivan or McCarthy or McGough, or something,
3827 instead of a poor fellow like Leon Fox, 13 years in the job, a fellow who today might be taking his family off to the beach.

Spielfogel said, "Wait a minute. I don't want my wife to hear it." They ask: "Where is the wife of Spielfogel?" I say to them, "Where is every other witness in this case?" I had every single witness I could get in my office in this case. I am responsible for putting the proof before you. The same as I have the right to get them in, he had the right. Why didn't he get them in? If I find it is better strategy to cross-
3828 examine her rather than examine her on direct; that is up to me. Why didn't he get her here? Because he did not want to take his chances? Or did he want me to get her in here so that he might cross-examine her for two or three days.

Mr. Solovei: I object to the statement and take an exception to it.

The Court: Your exception is noted. Proceed.

Mr. McGough: This is argument. It may not help you in your deliberations. These men here are not new lawyers. They are smart, keen, good trial lawyers; some of them the best in the Borough. When they ask "Where is Mrs. Spiel-

fogel?" I tell you they can get her just as well as I could. They did not want the wife here.

They went out, and on the way up, Malinsky said, "I dropped Hershie's hat on the job." And you remember it was February. He left his coat over at the Citadel, so his pal—who came here and said, at one time he would do anything for him, but now he did not like him—he did not like him because he did not live up to his promise to help support his family when he went away—Spielfogel said, "We had an under- 3830
standing if either one of us was in prison the other fellow would help support his family—he went up and got his pal a green hat and then went over to the Citadel Club and they started to talk." Malinsky then told him the whole thing. He said he met Jakie Rudish at 9 p. m. on Eighth Street and "from there we went down and got Ebbie at Houston Street, and Jakie drove the car." He said, "A load," meaning a car, he got it out in Brooklyn. He said, "After that" (Malinsky being quoted), "we shot out to Brooklyn to Coney Island. On the way down we 3831
had it all fixed. Moish was to go for the money; Ebbie was to hoist the cop. And Jake was to take the wheel." When they hit Coney Island they were early, and they went to the Cosmo and had a little snack. Ebbie stepped out of the restaurant, went up to the theater. He came back, and he said, "We may as well put the car where the bank is, a little bit away from the bank." Ebbie was to give the signal to Moish to keep his eyes open. Not long after that the cop came down with the manager. Ebbie gave

the signal and Moish got out and yelled, "This is a hoist." It is a hundred per cent sure the cop went for his "piece"; so I started pegging. When the cop went down, Ebbie yelled to the manager and grabbed the money, and away we went."

This is very important. Malinsky said to Spielfogel, "One of the doors in the car was broken. That is why I had to go in the front door and over the seat." And he said that even
3833 when the cop was on the ground he had balls enough to still keep on pegging. Can you imagine talking about a poor policeman who, though he is dying, remembers his duty as an officer and he is still firing shots? He called it "pegging". He spoke about "Valentine giving a brand new C note." Imagine the utter contempt these people have for the life of a police officer. You read in the Daily News about some newspaper contributing a hundred dollars to the family of an officer killed in the performance of his duty. "Valentine better get a brand new
3834 C note, because the cop sure is a goner." That is the contempt they have. They have the audacity to come in here and say they are framed, and try to pull the wool over your eyes. They think when you come in here you should park your brains outside that door. They hope you will decide this thing with your hearts instead of your brains. They come in here and make a flat, utter denial for Malinsky; a denial for Rudish that he and Indovino ever met. I don't care if they never met. If Indovino gave the tip to one of them and they killed Fox, Indovino

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could be on a steamer or a plane bound for Casablanca and still, under the Code, be guilty.

I don't have to show they ever met. They all knew each other. His Honor will charge you on that point. If Indovino gave one of them a tip and the crime was put through by one of them afterwards, all parties are equally guilty under the law. There is no variation in the degree of guilt.

Mr. Carabba, one of the lawyers, stands up and says, "We say here there is an utter lack 3836
of association or knowledge or friendship between Indovino and Rudish. I say the law in this case is very, very clear, that the tipster is equally guilty with the principals, even if he did not know all of the principals.

You remember Malinsky telling Spielfogel, and Spielfogel testifying, that they got over "seven bills" on the job. He got $20 extra from Ebbie because the two guns that were used in it were hot guns that had been fired; so to reimburse him for the two guns that they could not use again he got $20 extra. 3837

They went down to Rauch's and they put the money away.

Then there was the testimony about Tiplet also. He said those were the two guns Tiplet got up at Grand Central; two of them were 38s side-throws and two of them were 45s.

With respect to Rudish, Spielfogel said that before this crime, the day before, I think it was on Friday, the 14th, he met Rudish at the candy store in Seventh Street. Rudish asked him, he says, "I am stepping out on the job with Moish and Ebbie. How come you are not going out?"

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They are all pals. They are all beyond the pale of the law. Later, Rudish says, "Why aren't you going out, Slip?" So Slip says, "I just don't like it. I don't like the tipster", and he walked off.

On Saturday, sometime before this happened he has the same conversation, and at that particular time Rudish asked him for the address of his uncle. And that is important in this case because it tends to show that Rudish was the one

3839 that was out in the neighborhood and stole that car. He later on admitted, after the crime, on Sunday, when he was over near that meat provision shop. He said, "I think I will see your uncle today, and while I am out in Brooklyn I will grab a load for the job tonight."

The next time Spielfogel saw Rudish was on Sunday afternoon at the candy store. The first thing Rudish says, "Where were you last night?" "I was out in the ass hole of Brooklyn, but I could not get that address." And there was some conversation about leaving the address

3840 in his other suit. Spielfogel said, "Why didn't you call up your wife and get the address?" So he passed it off. Then they started to talk about what happened in Coney Island. Jake said, well, it was getting late when he was out there in Brooklyn; he had a date to meet Moish, so that he did not see the uncle at all. He said that he grabbed a car and he met Moish on Eighth Street, and he went and picked up Ebbie on Houston Street, and Moish had the guns, and the three of them drove to Coney Island. They went to the Cosmo Restaurant next to Loew's, had a little bite—it was early—then they went up to the bank, and he describes what happened up

there; and he was peeved at Moish. And the filthy langaage that they used! He said he would never step again with Moish, because Moish was a dog-cocksucker—a word I never heard before this case. He was peeved at Moish because of the way Moish handled himself on that occasion. Imagine one murderer blaming the other because he lacked guts and did not do as clean cut a job as perhaps the other fellow, Beitler did. He said he is through; he don't care whether he starves; he will never go out 3842
with Moish. "He is yellow". He would rather starve to death than step with him again.

They got talking about "Keep your mouth shut". Jakie is mad and says, "If that big mouthed friend of yours keeps quiet, everything will be O.K."

Jake told him they had plenty of shooting, they had plenty of fireworks down in Coney Island. He said that half of the sirens of the Police Department were screaming while he was up on the platform waiting for the train to take him back to the city.

He said they all met at the Citadel Club and 3843
he got his cut. He said Moish got the silver.

That is Spielfogel's testimony, gentlemen, in substance. Is there anything unlikely or unusual about it? Isn't it natural that these confidants and friends of theirs, would disclose these things —seeing that they are all in the same particular racket or business?

Spielfogel did say something on the stand about seeing Malinsky at the hotel. Malinsky said to him, "Well, they got Jake in the next room." Imagine McNally using a little psy-

chology and telling one of these defendants he has got Jake in the next room! That is the old wheeze of using one against the other: "You better spill, because Jake is in the next room."

When they got Jake, they told Jake the same thing; only Jake didn't fall for it.

Spielfogel says they talked in a big closet. Malinsky, in front of the others, said he would like to talk to Slip alone. But Slip, as I will point out was pretty mad. This fellow had not
3845 played squarely with him when he went to do his thirty-to-sixty. He said this is his day. Malinsky asked "Could he talk to Slip alone?" They are together in the closet. He goes up and says to him, "You know they know so much now, I think I better open up. They got Jake in the next room," he said, "what do you think I ought to do?" Slip says, "You are over twenty-one. You know the score." He did not care what he did. He knew the cops, were going to break him down. Just at that moment Meish said to Slip, "What do you think I ought to do?"
3846 Slip gave him the brush-off and says, "You are over twenty-one. You know the score. Do what you want."

Then there is some testimony there—not by Lieutenant McNally—it might be Spielfogel—that this defendant Malinsky said, "What shall I do?" He said, "If I tell the truth will I go to the electric chair?" McNally said, "This is a cop case, I cannot promise you anything. It is up to yourself. If you don't want to talk, don't talk. We cannot make you any promises." If he made him any promises, gentlemen, and the case came to trial afterwards, we would have

to let this man go. Any man that confesses under a promise of help from the District Attorney cannot be prosecuted. But Lieutenant McNally knew his business. He wanted to make sure that there were no promises. He said, "It is a cop case. I cannot make any promise." Then Malinsky started to talk.

Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That 3848
is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking.

McNally took one look at him and said, "Come here"—just a little tough talk—"what do you know about it?" Six o'clock in the evening after he was picked up, he told the whole thing.

Then we have the next witness, this young man Eisler, who said he was twenty-six, never in trouble in his life, knows Rudish fifteen years, knows Malinsky three and a half; does not know 3849
the Tiger. He also knows Slip, and knows Dave Yellin, he says. About this particular time, in December, 1940, he was given this errand I spoke about before. Malinsky gave him four dollars and a ticket, and told him to go up to this place in Grand Central and bring the package down. He did not know what the package contained until after it was brought back and opened by Malinsky at the Citadel Club.

That testimony, as I said before, is important, because it backs up Spielfogel. It backs up Spielfogel's testimony that he got the same

information from Malinsky. Where do you think I found out about Eisler? I got it from Spielfogel. That is the natural inference. Where did Spielfogel get it from? Right from the mouth of this defendant Malinsky. So I sent out to Tacoma to invite Eisler and he comes in and swears to tell the truth, and goes up on the stand. What reason does Eisler have to come in here? What particular motive, if any, has he? What gain can he get out of this?
3851 What peculiar frame of mind can he have to come in here and finger a man in a case that may rest emotionally on his conscience for the rest of his life, if it was not true?

Then we have that young boy Shamin. And I was wondering what Patrolman Leon Fox would say if he were seated here and could listen to counsel champing at the bit and saying, "A most outrageous thing has taken place in this case—locking up a young boy in a case like this."

Let us be fair about it. That boy was cross-
3852 examined for forty-five pages. If you don't believe it, count it, yourself. He was cross-examined and derided and beaten from pillar to post; all in an effort to break him down on this particular story.

Before that he was committed as a material witness in the regular procedure, by a Judge, on an application based on affidavits. We set forth in the application the facts upon which the application was based. Mr. Solovei had that application in his hands. He knows the reason why the boy was committed. The testimony is that the day the boy testified he was released.

That boy lives in the lower East Side, and works in Jersey. It is important to have all these witnesses available. I don't want to call out the name of a witness, and then learn he has failed to appear. Let us be fair about this. When they talk about high-handed, outrageous business, don't take any stock in that. You want a District Attorney, as I said before, who is going to do his job, and do it right. Shamin did not complain, and Shamin was released before he gave the most damaging testimony here. The 3854
first day I had to be satisfied to get in only the testimony on the gift of the hat. You remember that. It was not proper to bring out testimony about the guns before this defendant took the stand. The Judge very properly ruled that might be error, so the Judge said, "At this time I will strike it out. I will allow only so much of the testimony as concerns the hat." But after this fellow denied that he ever gave those guns, it was proper for me to bring back the boy. He came back, and I say he made a very excellent witness. He felt the butt of a gun in 3855
this bag of "pieces" this defendant told him to get. Can you imagine the utter lack of morals and the braggadocio of Malinsky when he says to the boy, "Go and get the package of 'pieces'"— and make himself out to be a big shot and saying—"Get the guns! Get the 'pieces'"!

Why all this by-play and fuss about the shamefulness of somebody. Don't pay any attention to it. It means not a thing. They have got to say something here. These men cannot come in and plead guilty in this type of case.

They have got to make a defense, resort to some type of defense. Where there is a confession, almost invariably we have the defense of being beaten, and it is up to the jury to decide whether or not the defendant was beaten. They come in here and they shout for this and they shout for that. I don't begrudge it to him. If I was there—and God forbid I ever should be on that side—I might do the same thing myself. They have got to say something.

3857 They talk about four men going on trial next year, and even after, for this crime. They talk about the shameful act of locking up a boy like Shamin. I say that is all beside the point. If the proof here measures up to a point where you should find these men guilty, that is sufficient for us.

Running briefly through this boy's testimony, he swears he worked full time in the Summer of 1940, and continued to work on—he says, "On Saturday" after school started again in the Fall. He did not know what particular date it was, but around the 15th of February. Here again I could have got him in a room with some others. I did not say to him, "Now listen, this is the date you have got to make your date—or else." I said to him, "How do you fix it?" He started to explain it. He gets up here and wavers a little. Isn't that wavering, the natural, logical thing for anybody to show? If they took me and put me up there, I would say, "I don't remember dates." So, without prompting him, I asked him if there was any incident which would help him to fix the time. But because he wavers, I say he is the more honest witness, and one who is trying to tell the truth. Finally, I

3858

gave him a 1941 calendar. I had him take a look at it, and I said, "If you think for about a minute now, we would like to have you give, after refreshing your recollection, the date in February that this took place." The boy came back here yesterday and one of my colleagues had the audacity to say (which I tried not to answer) "McGough gave him the 15th." I did not say any such particular date. I will show you that in a few minutes. McGough does not have one notion of any kind of framing defend- 3860
ants. I am not going to do it, nor do I have to do it. If anybody in this court thinks differently, gentlemen, act on it, and send them home, and acquit all the defendants.

He stated on that particular night he remembers that Moish was absent for a long time. Up to closing time he was not there. He does not know where he went. I asked him and he said on that afternoon, the same day, Moish asked him to get some "pieces" out of the hallway, between two boxes of napkins. The bag was heavy, something hard, and he felt the butt of a gun. That 3861
fact alone, gentlemen, would make him nervous. He was living on Avenue D on the East Side, and he would have to go back there to live. Don't you think he would be a little timorous at meeting some of these defendants' friends? Don't you think that he would be a little upset in this case? Don't you think the District Attorney was justified in moving the Court that he be held as a material witness? Nothing unreasonable about that.

He stated that he saw Moish with a brown hat that looked like the one in this case. He wa

3862

honest about it. I could tell him, "Just go up there and swear that is it." But he did not say this is positively the hat; he says, it looks like it. He says he does not know from whom he got it, but Moish did tell him that he got it as a gift about a week or so before this incident with the guns. Is his testimony believable? Doesn't it lend credence to the story as told by these long-term offenders, Kovner, Spielfogel and Yellin?

Take Virginia Goonan—and I say the most im-
3863 portant witnesses in this case are Goonan and Di Pisa, because they substantiate and corroborate Spielfogel's testimony. Virginia Goonan, I think she said she was twenty-three; she looked that way—no record. She knows this man Malinsky now three years. She knew him as Moish. She does not know Rudish; she knows Indovino. There was a lot of testimony here on the defense that Indovino never knew Malinsky. Did this girl lie when she said she saw Indovino over there in September, 1940 in Max's store? She said Moish introduced him and said, "This is my friend, The
3864 Tiger." Was she lying about it? Did somebody tell her about it? Was Kovner lying when he said that at the time he spoke to Indovino, Malinsky was present. Did I supply that to them? If anybody wanted to supply those things, he could supply plenty. These witnesses came here and spoke under oath; so now it is for you to say whether they are lying or not.

She said she lived for a period at 231 East Tenth Street. There was a photograph of the house admitted in evidence. There was testimony she lived there for about three or four weeks, starting some time in January. She said that at

about 2:30 a. m. on this particular night she was awakened by loud banging on the door. She saw Shirley and the husband get up and she saw Shirley open the door, and she saw Moish Malinsky. She heard Malinsky say to his sister, "Can I stay here tonight? We just shot a cop. We each got $200."

She was sleeping on the couch and when that was said she got up and went to the kitchen and she asked him, of course, with some surprise, under the circumstances, "What happened?" She 3866
said to Moish, "What did you do? Shoot a cop?" And his reply was "Get back in bed before I give you the same thing as we gave the cop."

That is her testimony. Did somebody get her to come in here and say that, or did that really happen? Is there any denial here that Malinsky knew her and loved her for a while, or, at least, that they were boy friend and girl friend?

She saw Di Pisa put Malinsky out. This was on Saturday, because Malinsky was to take her to a show on Saturday; and she left the house the following day, and she did not see him since. 3867

Now, after the cross-examination of this girl, you may come to the conclusion, "Well, she is not sure", but the cross-examination of that girl makes all the stronger the testimony of Di Pisa, the brother-in-law of this particular defendant.

Now, I would not call in this defendant Malinsky's sister. I would not call any relative of any defendant, and ask that relative to testify as a prosecution witness in a criminal case. I do not think it is the right thing to do. But I have the right to go out and find out whether the brother-in-law knows what the girl told me. So I brought

3868 *Summation on Behalf of People*

Di Pisa in and Di Pisa goes up and swears against his own brother-in-law; and I say, if there was any answer to it, and it did not happen, the sister, Mrs. Di Pisa, should be in here.

Mr. Solovei: I object to that statement.

The Court: Overruled.

Mr. Solovei: Exception.

Mr. McGough: And if she is not here, you can draw the inference that her testimony would

3869 be damaging to him.

Mr. Solovei: I object to that statement.

Mr. McGough: Di Pisa said he knows Malinsky three and a half years, and is married to the sister, Shirley, seven years. February 15th he lived at 231 East Tenth Street, and he identified the photo. He said late that Saturday night he saw his brother-in-law, Malinsky, some time after midnight. He was asleep with his wife. The Italian girl, Jean, was on the couch in the living room. He said he went to bed about 10:30 that night, and several hours later he was awakened

3870 by loud knocking on the door. His wife, Shirley, went to the door, and he woke up and went out to the kitchen door and he saw Moish Malinsky. He said that Jean was standing between the kitchen and the living room. Di Pisa swore that his brother-in-law, Malinsky said, "I was in Coney Island. I killed a cop. I want to sleep here tonight. I got $200 in my pocket." And you remember Pete saying, "Get the hell out of here", and he put him out and closed the door. He said he heard another man's voice in the hall but did not see him. He says he remembers this happened very early in the morning of the

16th—he said he remembers that same day reading in a newspaper, the Daily News, about a policeman named Fox killed in Coney Island. He also testified under cross-examination that his wife clipped out the piece in the paper, and they have it at home.

Isn't it logical? A brother coming to the house and saying, "I killed a cop out in Coney Island"—wouldn't you or I do that same thing, and save the piece in the paper.

He comes in and swears he is sure it was on 3872
the 15th when he went to bed; some time before he got up on the 16th he was awakened out of his sleep by this defendant; and this defendant comes in and makes that damaging admission.

I say to you again, gentlemen, the case against Malinsky is overwhelming; even without the confession. You should have no trouble with that. Goonan and Di Pisa lend credence to these other men; and on cross-examination there was the proof they were telling the truth.

The next witness was Lieutenant McNally. He told you how he handled the investigation. He 3873
remembers Malinsky identifying the hat, and putting his initials in the hat "M.M." Why did Malinsky refuse to put his fingerprints on the car, as he says, and at a later time, or earlier time, put his initials right in the band of the hat. Did he think he was being framed at one time and not framed at another, or was he just acting stupid or was he just trying to be smart? Nobody took him up to that place to get fingerprints from him. The record of the police would show the car was checked for fingerprints that night, Hollingsworth, himself, said it was covered with fingerprint powder.

3874 *Summation on Behalf of People*

Do you think Celano, after fourteen or fifteen years in the Homicide Squad would be so low as to try to frame Malinsky, and frame him after he made a confession?

Malinsky put the "M. M." in the hat, but he was afraid to touch the door handle on the car because he thought he might be framed.

McNally told you Malinsky was questioned, and he maintained his innocence up until 5 o'clock that day. He told you how it came about
3875 that Yellin was brought down. He told you that he was not present when Indovino was brought in, but the man was arrested some time on Saturday night, I believe. He denied that he struck Malinsky, denied that he saw anybody else strike him. There was a time where the question of whether the confession was voluntary or not came in. I had to call some witnesses. I called James Bell, a detective. He said he picked Malinsky up. I called George Low, who is now in charge of this case, following the transfer of Detective Basch. He testified he brought Yellin from Sing Sing with Bell. I put Celano on to
3876 testify to what he knew about the hotel, what he knew about the police garage, and also about being down at the scene of the crime when this New York braggart went with him and reenacted the crime. I also put him on to explain the whereabouts of Harry Levine, to show the unavailability of the witness, so that you would not be speculating as to why I did not bring him here. You saw and heard Detective John McNally. He testified about being with Bell at the time Malinsky was apprehended. He also testified he was present at the garage when Celano asked Malinsky about the car. He also

testified about the right rear door being difficult to open.

Then, gentlemen, the next witness in the right order would be, I think, Kovner. And Kovner said something on cross-examination that should make a great deal of difference in this case. They asked him would he commit perjury to help himself. Kovner said he had no reason to commit perjury; he saved these three defendants from being killed at the hands of Beitler—why would he save them one year and then come 3878
down here from Attica Prison, and try to convict them of murder.

Mr. Solovei: I object to that statement of the District Attorney, that Kovner said he saved these men from being killed. I don't remember any such testimony.

The Court: The jury will disregard the District Attorney's statement unless it is borne out by the fact. The jury's recollection of the evidence will control.

Mr. McGough: As I said, gentlemen, if your recollection is at variance with mine or that of anybody else, then you can disregard it, and if 3879
there is any real doubt, you can ask his Honor to let you come back here and have the testimony read right from the record.

Reading from Page 625, with respect to killing these three defendants, Kovner was questioned by one of the lawyers—I think it was Mr. Geoghan. He was asked:

"Q. Would you commit perjury to help yourself? A. No, sir.

"Q. You consider that is too low a crime to commit? A. That is right.

"Q. Even though it would mean helping you

to lessen the term of years— A. I don't have to—

"Q. Wait a minute—that is now hanging over your head in prison. You would not do it even for that? A. No, sir.

"Q. You would commit robberies with a gun but not perjury, is that right? A. That is right.

"By the Court:

3881 "Q. What do you mean, you don't have to? A. If you let me explain, I will.

"Q. You may explain? A. I don't have to, because if I did not stop Beitler, he would have killed certain people. Beitler wanted to kill certain people and I stopped him; the people over there."

Mr. Multer: Objected to, if your Honor, please.

Mr. McGough: Next question—I will continue this, Judge.

"Q. You had to stop him? A. He came to me—" And I jumped up.

3882 "Mr. McGough: Wait a minute. If the door is opened, I will march right in."

That is what I said.

"The Court: Do you want to pursue this further?

"Mr. Geoghan: No, he is volunteering something.

"The Court: Proceed."

Do you think Kovner committed perjury here? If you think he committed perjury, and the other

two men, then set these defendants free, come in with a verdict of not guilty.

But, first of all, what is Kovner's testimony? Kovner said he was a pal of Beitler. If you wanted to find out anything about Beitler, whom would you really want to examine? Whom would you interview? Wouldn't you take his own pal? That is exactly what I did. I figured if Beitler was up in that place where Kablonsky and Kovner were arrested, at the Abbey, then the fellow to question was either Kablonsky or Kovner; and 3884
I got hold of Kovner. He is, as he told you here, in Attica Prison. He told you he was brought down, and the first man he spoke to was his father. Isn't that natural and logical? That is his responsibility. He wanted to talk the matter over with his father and get his advice. Then he spoke to me, and the testimony on that is that about the 9th or 10th of February the Tiger and Malinsky came to Broome and Attorney Streets and spoke to Beitler and to him, Kovner. Tiger said he has a piece of work and they wanted Beitler and Kovner to go out on it. Beitler said 3885
to him, "What is it all about?" Indovino says, "It is a $2500 job in Coney Island. A cop goes along with a man, or a manager, but if you put a pistol in the cop's back he will give up." You remember Kovner saying he took Beitler aside and spoke to him, and then Beitler went back and said to this Tiger and Malinsky, "Sammy don't want to go. He does not want anything to do with cops." To another crook, that was good sense, "He don't want to buck up against the cops"—whether it was a Leon Fox who would pump while he was on his back, or a yellow cop;

he didn't want any part of cops. Ebbie was asked by the Tiger, "Do you want to go?" Beitler said, "Wait a minute; I want to talk to Sammy." Then Beitler asked the Tiger and Malinsky, "Are you fellows going?" And the Tiger said—the fellow that was in the box—"I would like to but I don't think I can go on the job. I am known down there." He was not only known but he did not have the guts that Beitler did; so I have got more respect for Beitler, the one that is dead, than I
3887 have for him. He wanted to be the tipster, the man in the background. He is the one who is hiding behind a woman's skirt, saying he ate dinner every night up in his girl friend's house—not once did he go out with anybody else—never had dinner with his mother, but hung around his girl friend's house. Did he say "fiancee"? Do you think the Tiger ever heard the word "fiancee" before he came in here, or does that sound like the language of my good friend Mr. Geoghan? "Where were you such and such a night? A. At the home of my fiancee."

3888 He said he never lingered around the place he worked; he was always home at six o'clock at the fiancee's house. On holidays, when he was not employed he was down at the fiancee's house and doing other things.

So he tells the boys about it that night, Beitler and Kovner: "I would like to go but I cannot go on that." So Beitler says, "I will go and I will look for another man." Beitler asked Tiger, "What time does it go?" And Tiger says, "You have to be in Coney Island, say, 10:30."

The second time that they met the Tiger, was a week after the occurrence—the 22nd, I think he

said it was. There was nothing mentioned then about the Fox case, but the Tiger asked Beitler for money, money, money. If he was working, why did he need the money? I say at that particular time he was trying to get married. He was married on the 21st of April, just a short time after this. He did not get any money, but Beitler made a date to meet him two days later; and that date was kept. It was nine o'clock at Houston and Allen, in a bar and grill. Three people were present: Beitler, Tiger and Kovner. 3890
That was the time that the Tiger made a complaint. If there is any doubt that he knew what happened down at Coney Island, and if there is any doubt as to whether the law is against the People on this particular point, remember this testimony. The Tiger gave them a tip. The job was done just a week later. The Tiger is complaining. He said to Beitler, "Why did you have to shoot the cop in Coney Island? You are too hot. Why didn't you walk up and put a gun in his back?" You could see he was a little sorry, he was sorry the cop was killed. I say that if In- 3891
dovino planned a robbery and gave them the tip, and the officer's life was taken in the commission of that felony holdup, then he is equally guilty of murder in the first degree. The mere fact that he later shows some remorse, does not exculpate him, does not excuse him. If he gave the tip and the robbery was consummated and the officer lost his life, and the evidence points to his being the tipster, I say this evidence here shows he is guilty.

In answer to that Beitler says, "I am on the lam. I cannot take any chances on a copy identifying me." Doesn't that back up Trusch's state-

ment that Beitler, or whoever it was, intended to kill the cop, when it is considered that there were powder burns on his chest and there was a hole through-and-through his coat and body? Why, I imagine you could put your fist through his chest. The Medical Examiner said there were over two and a half quarts of blood in the poor man's lungs. A day or two later, the Tiger complains: "I hear you made a score"—meaning a holdup—"have you got any money?"—asking for money again.

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Then there was some testimony about other days.

We know that Beitler died up at the Abbey, on the 27th or 28th of October. There was proof offered on the part of the District Attorney to show that Beitler's death was a certainty and that the man is no longer in existence.

There was a shred of testimony at the end. I don't want to burden you. You may recall that Kovner said that some time in March Malinsky told him that he was in on the Fox job. I said to him, "Did he ever speak about the Fox job at any other times?" he said, "Five or six times. Malinsky was always talking about the Fox job." Doesn't that sound just like him—the fellow that was telling the little boy Shamin about the "pieces", the fellow that was bragging to Virginia Goonan, "I killed the cop—get back to bed" —the fellow that told his pals, Spielfogel and the others, all about it.

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Under cross-examination by Mr. Geoghan he said he met the Tiger in August of 1940, met him in the same bar and grill, Houston Street and Allen; that he was introduced by a man named

Foxy, otherwise unidentified. He said some time after the first time at about the 10th of February, 1941, he saw him five or six times passing by and just said "hello" to him. You remember his testifying the first one he spoke to was his father. On cross-examination he said the next one was myself.

Gentlemen, I have a few notes on things that I want to remind myself on and then I will be ready to conclude.

There is one thing you must not speculate on 3896
here. These men from State's prison are not being given immunity in this case. They have no interest in this case except as witnesses. They are not involved in the robbery in this case. McNally would have them indicted if they were. That is merely an argument on the part of defense counsel, that these men are involved in this case. It is entirely possible, and it is my contention, that these witnesses here were so friendly with these particular defendants, they got the story just as they told you here. They got the story, although at the time they had 3897
never thought they would turn State's evidence, at a time they thought they would never violate the code of the underworld.

I have no apology, gentlemen, for the way the District Attorney has handled this case. I have tried to be fair. Any time a statement was demanded of me I made no bones about it, I handed it right over, even the statement of Dave Yellin, that is not marked in evidence because it could not be offered; but I handed it over, and that was marked for identification **People's Exhibit C.**

3898 Dave Yellin was questioned by a District Attorney and a stenographer on the very night he came down. If there was any difference between what he said that night and what he said here, my most worthy opponent, Joe Solovei, would have had it right in the record here. If there was any difference between what Yellin said that night and today, you would have it right here in the case. Isn't that a fair and reasonable statement?

3899 And these 62 times, about taking these fellows out of the jail, there is nothing unusual about that. They took them out for a little air, to humor them.

I did not get this case until March the 5th, at a time when I was over here on trial in another case that went to trial twice. That does not mean that some other District Attorney was preparing it for me. The only assistant I had in this case is my good friend Ralph Van Ness, who was assigned to other men up to the time that we started preparing this case. Nobody

3900 worked on these men, and it is unfair to say that the 60 or 62 times they were out they were always talking about this case. Of course they had to go to other counties, to assist the District Attorneys in other cases. Dave Yellin testified he went to Monticello. One of them had glasses and he had to get them fixed up. They would go out for air. The fact they were out 62 times does not mean anything.

There was one other statement I handed over here, People's Exhibit G, the statement of Peter Shamin. If there was any variance between what Shamin said here and the time I examined

him, March 23rd, at ten o'clock at night, you would hear about that.

I could easily have told these witnesses, "When Mr. Solovei and others ask you if you had a stenographer present, say 'No'." I could easily have precluded him from obtaining these statements if I wanted to be dishonest. I could tell them, "Don't admit a stenographer was there." But a stenographer was there. I did not tell them anything to say. They could not say that I did. He said, "I now call on the 3902
District Attorney to produce", and I whipped the statement right out and I gave it to them. When I go home at night, I sleep. I don't want any of these fellows to come back and haunt me in my dreams. If he can get anything out of these statements, more power to him. That is his job, to turn them out if he can do it. So, I say I have no apology for my handling of this case.

I would like to ask you gentlemen, if you were the prosecutor in this case, would you handle it in any different way? Would you go up and get 3903
Kovner, who is Beitler's friend? Would you get Yellin, after Rudish happened to say he was the man that could clear him? Would you put Shamin in jail because you might have thought he would stay at his work in Jersey, or stay away for some other reason, or shall I scratch my head when he does not respond? Let me assure you, I don't have to scratch my head for anybody.

It is ridiculous even to infer that anything was manufactured in this case, either by the police or by a witness or by anybody. But if

the police wished—if these policemen in this case wanted to avenge their brother officer, they could have done a much better job. Rather than bringing in a case which I say to you shows sincerity and proves guilt beyond any reasonable doubt, they could easily go out and get some person who might be a stool-pigeon, identifying these defendants as an eye-witness; if they wanted to avenge a brother officer. But these officers are not that type of men. These men
3905 are gold shield detectives, that have earned their stripes, like McNally, in charge of a great big teeming district like the 62nd squad, almost as bad as the East Side of New York. Has the defense in this case given the same ring of truth and the same ring of sincerity as the People's case?

Mention has been made here of Yellin, that he did not name the theater and Spielfogel did. I say that shows sincerity. Dolinsky said that one man jumped out of the car. There is testimony that there were two out. That shows sincerity.
3906 I could easily put them together and have them all agree on it.

The Judge will charge you that if you find that any witness has lied on a material point, you are at liberty, in your own discretion, to disregard that witness's entire testimony; or you can accept the part you believe and disbelieve the rest. That is the rule. That rule applies to defendants too, if they appear as witnesses. If you find these defendants here have lied, you are entitled to disregard their entire testimony.

The Court: Wilfully lied.

Mr. McGough: Wilfully lied on a material point.

The Court: Must be a wilful falsification as to a material fact. Then the jury has the right to disregard the entire testimony.

Mr. McGough: His Honor stated the rule as I wanted to state it.

The Court: Or accept that part that they find to be true and disregard the other.

Mr. McGough: On matters of law, gentlemen, it is not within the province of counsel. That 3908
is something the Judge will give you in detail at the time he charges you.

Remember about Indovino's employment at the time. Was it a real employment? Was it one of those convenient jobs? Mention has been made here that all these men are working. Did you ever see a parolee who was not working? If he were not working at some kind of job, whether it is legitimate or serious or not, he would have to go back to prison; he could not be on parole.

Where was Indovino supposed to have been 3909
working—this Star Pad Company? Was that a legitimate employment or was that one of those blinds to deceive the Parole Board. Parole at its best is only a perfunctory thing, when there is a certain number of officials supervising thousands of men. How often do you think they go out to check employment?

Malinsky was working for $15, over in that five and dime place on the East Side, when Shamin was told to get the "pieces" and put them in the toilet.

So employment doesn't mean much. I don't

3910 care whether they had jobs in lawyers' offices or in churches after the commission of crime. It does not show what they did at the time this occurred.

There has been mention here that Slip and the others were examined by psychiatrists, and he lied to the doctors. There is nothing surreptitious or unusual about that. In that particular court, as pointed out by the Judge, there is a psychiaric clinic and every single prisoner
3911 convicted of crime, and every man, woman and child convicted is examined. Those doctors go into the facts of these cases, and wise criminals are not going to tell the doctors anything that might come back to haunt them at another time. Of course they lie about these things. These men told you they are up in the "bug house". Indovino says he was up in the "bug house".

Mr. Multer: Objected to. Indovino did not say that.

The Court: Sustained. He said he was in the "box".

3912 Mr. McGough: There is a distinct recollection on my mind. If there is any doubt, you look it up. He said he was in the "box" and then at some time he mentioned being in the "bug house" in Elmira. I say whether he is in the "bug house" or in the "box" this might have been said also of Indovino and not alone of Spielfogel. Spielfogel is now "in population at Sing Sing". That means he is surrounded by hundreds of others. In fact both of those jails are not for mental cases. So when one counsel says, "There may be some psychosis in him" I say that that is surplusage and hasn't anything to do with the issue here in this case.

Mr. Geoghan said, "Do you think Indovino, if he had any decency, would do anything to send himself back to prison?" I say he has no decency and never did have any decency. Whether he served a term up in Elmira and has any decency or not, does not make him guilty or innocent in this case.

I say he knew Beitler up in Elmira, even though he denied it. He admitted he knew an Ebbie up there. Don't forget that when a man comes from a certain city and goes to an up-
3914
state prison it is like a boy going to a boarding school in another town. He gets to know the fellows from his own place. Beitler was from New York, Indovino from New York, Spielfogel from New York. That joins them together and they congregate together and talk about things. It is up to you to determine whether he knew Beitler at Elmira or not.

I think the police in this case are to be congratulated for the manner in which they handled Spielfogel and Yellin. Getting the truth out of those two birds did more to further justice in this State than anything I can think of in the 3915
last five years in connection with crime in this county.

If you believe Di Pisa's testimony you must agree that Slip told the truth on the killing. You must remember there is no bad blood shown between Yellin and Rudish; no bad blood shown between Yellin and Indovino; and no bad blood shown between Kovner and Indovino.

Counsel for one of these men recited a portion of the testimony, and forgot to read the last part. He said, "Don't you think if Spielfogel was admitted up at that house that night,

at Shirley's house, he would be able to testify to what took place?" And he argued that that never occurred, otherwise Spielfogel would tell you about it. He read this part, reading from page 255:

"Q. What part of the house did you go to? A. I went all the way up into the house, into the kitchen." That was asked by Mr. Solovei of the witness Spielfogel. He says, "Why didn't Spielfogel tell you the same as Di Pisa and this girl Goonan? Because it never occurred," he said:
3917 but he skipped the part I am going to read, where he says that he saw he was not wanted and he left the apartment. Page 259: "Q. Tell us what you saw and what happened there; give us a description of the place"—this is the apartment— "A. All I seen him do is talk to his sister, and I walked to the sink and took a drink and walked back out to the hall. I felt I was not wanted as he wanted to talk to her private. Q. But you were actually in the kitchen? A. That is right. It was dark and they did not have the lights on, and he spoke to her a few minutes."
3918 This is the part he did not want you to know: "And then I heard him say when I was out in the hall, 'Get back to bed,' to somebody; I don't know who he was talking to."

Doesn't that corroborate Jean Goonan and also corroborate Di Pisa?

At the risk of repeating, gentlemen, in the case of Indovino you have Yellin's testimony of the tip "something good"; you have Kovner's testimony that he met this man four times, he also saw him around Houston and Allen Streets in 1940; you remember the testimony about his trying to get Kovner out on the job too. Against

Indovino you also have Virginia Goonan's testimony. She said she saw him with Malinsky at the store six or seven times.

On Rudish you have the testimony here of Lieutenant McNally that Rudish said, "Yellin can prove I am innocent"; you have the testimony of Yellin with respect to the night of the 15th, when he called him out of the game and told him the whole thing, told him about stealing the load, driving to Coney Island, etc.; you have the testimony of Spielfogel against Rudish both 3920
before and after the crime: Before, he asked him, "Why don't you go?" And after the crime, that he told him the whole thing, and when he was mad at his friend Malinsky. That conversation was over near the meat market on Sunday. He admitted the theft of the car to his pals Yellin and Spielfogel—and don't forget—on this particular defendant—he is an auto mechanic.

Now on Malinsky you have so much I don't want to bore you with it. He told Spielfogel. You have the hat; you have the admissions made to Di Pisa and Goonan; the door handle of the 3921
car; picking the car out in the garage; the full confession in plain English; no complaint about a beating to the jail doctor. You have Red Eisler, you have Shamin— "Go and duck the pieces"; you have Kovner, telling him in March of 1941.

With respect to Indovino, let me say he was too yellow to go out on the job, and that he told both Kovner and Yellin the same thing. Reading from page 134, when he gave the tip, he told Yellin: "Indovino said that he could not go on that trick because he was too well known out

3922 in Coney Island in that section." That is what he told Yellin. Here is what he told Kovner and what Kovner testified about it (page 602 of the record): "Tiger said he cannot go; he is known and he cannot go. "Q. He is known? A. Yes; he told Ebbie that he cannot go; he is known down there. Q. Down where? A. Down in Coney Island."

And it was at that moment that Ebbie said, "I will look to see if I can get a third man to go
3923 along."

With respect to what he told Yellin and Beitler, I would like to read very briefly, gentlemen, how this whole thing was set in motion, and how if it were not for the act of Indovino, Fox would be alive and these defendants would not be on trial. Reading from page 130, from the testimony of Yellin: "A. Ebbie called me as I was walking by, and I walked over to him and he introduced me to Joe Tiger, saying, 'Joe Tiger, Davie Yellin, a friend of Slips'. Then he told me, he says, 'This fellow has got something good
3924 out in Coney Island.' I asked him—he asked me—he told me he wanted me to deliver this message to Slip, and he started to tell me about—then Joe Tiger chimed in and he told me, he started explaining the trick to me and he told me it was—" then there are some interruptions —"Whom does he mean?"—the conversation had with Indovino—down at the bottom of page 131: "Indovino started explaining the details of the job out in Coney Island. He told me it was the manager of a bank who takes the day's receipts to the bank, a few blocks away. He said the neighborhood was as dead as Kelsey's nuts. He says it is a cinch job.

"By the Court: Did he say it was the manager of a bank? A. Manager of a theater. He says the neighborhood was dead, and it would be a cinch job. He told me that the money was escorted by a policeman who walked with him, but they did not have to worry about the policeman, because he was not looking to get killed, he would give up as fast as anybody." Continuing, at the bottom, "that he said the money left at about eleven o'clock, left the theater about eleven o'clock. He told them just where to park 3926
the car." This is Indovino. "I don't know Coney Island very well so I cannot tell you just the street he wanted to park the car on. And then we got through with that conversation. Ebbie told me, he says, "When you see Slip tonight, tell him I want him to go on the thing with me and tell him what it is all about.'" There was conversation on page 133. "Indovino said there would be about a thousand dollars for that night—it was a busy night—there would be about a thousand dollars." "Indovino said that he could not go on that trick because he was too well known out in Coney Island in that section." 3927

That is the seed that resulted in death, gentlemen, sowed by this defendant Indovino.

Now, gentlemen, I have taken a little extra time; but the seriousness of this case makes me feel that even at the risk of perhaps inconveniencing you, I should point out these things to you.

There has been mention made here by one of the attorneys to send Indovino back to his wife,

send him back to his family. Well, gentlemen, it is almost with indignation that I tell you that there is one man in this case that can never come back, and that is Officer Leon Fox; who, if it were not for the acts of these defendants, would still be here today.

When they are talking about sympathy in this case, let me ask you this: Let any plea for sympathy in this case leave you just as cold as the body of Leon Fox, out in that cemetery where
3929 he lies today, or as cold as that bullet that is marked in evidence, People's Exhibit 1 or 2 in this case. That is all there is to it. Sympathy is something they are not entitled to. They are entitled to a just consideration of the evidence—nothing else. They are entitled not to have you prejudiced against them by any means, but they are entitled to no sympathy. If they committed this crime they should have a verdict here which will square with the evidence: "Guilty as Charged", so that we can send this case along. If they are not guilty they should be sent out.

Now, gentlemen, you have the evidence, and
3930 the evidence adduced from the defendants themselves.

Take the case with you, after you hear the Judge charge you on the law, and do the best that you know how with it. If the evidence is there—and I submit that it is there in its entirety—act on the evidence, and stand by the courage of your convictions, and come out here and say, "Guilty as Charged; no recommendations for any of them—no one or the other or a particular one"; and, gentlemen, your service will be appreciated by this community.

Defendants' Objections to Summation by District Attorney 3931

Mr. Solovei: Just one motion may I make, if your Honor please, in view of the District Attorney's remark in reference to the sister of Malinsky, Shirley, not being called as a witness, and if she were called as a witness that damaging testimony would be against the defendant Malinsky—or words to that effect—and upon all the other objections made—

The Court: Suppose you just stay with that objection. I am going to sustain that objection and tell the jury to disregard it. 3932

Mr. Solovei: I am goirg to ask for the withdrawal of a juror and direction of a mistrial.

The Court: Motion denied.

Mr. Solovei: Exception. Upon all the other exceptions taken during the course of the summation.

The Court: Motion denied.

(At this point Mr. Morritt gets up.)

The Court: What other points do you have, so that there will be no mistake?

Mr. Solovei: The ones I made during the summation. 3933

The Court: Repeat them.

Mr. Solovei: I don't know. I made them during the time I got up.

The Court: Repeat them.

Mr. Solovei: I cannot remember now. The record will show.

The Court: The motion is denied.

Mr. Morritt: I respectfully ask your Honor to direct the jury to ignore and disregard the comments and references made by the District Attorney in the summation, with reference to the District Attorney's remarks concerning the de-

fendant Rudish's height, and the attempt to place him in the automobile or at the scene of the crime. I ask the Court to advise the jury that there is no proof or evidence whatsoever, of any real or direct evidence from which it could be inferred that the defendant Rudish was either in the car or at the scene of the crime, or participated whatsoever in the commission of the crime charged in the indictment; that the only
3935 evidence—

The Court: Let us not argue about it, Counsel. The District Attorney has pointed out the alleged confession of your client, made—

Mr. Carabba: Your Honor—

The Court: (Continuing) —to either Spielfogel or Yellin or both. Now the credibility of the witness who testified to such alleged confession, or the credibilities of the witnesses who gave such testimony, is of course for the jury. Your motion is denied; your objection is overruled.

3936 Mr. Morritt: I beg the Court's indulgence for a moment.

The Court: Your objection is overruled; you have your exception. Your objection is overruled.

Mr. Morritt: Exception.

Mr. Multer: The defendant Indovino objects to the summation of the District Attorney in its entirety, as well as the questions directed during the course of it, on the ground that they are highly prejudicial to the defendant Indovino, and that he has referred to and asked this jury to draw inferences directly contrary to some of the evidence; because he has referred to matters that

Defendants' Objections to Summation by District Attorney

3937

are not in evidence and were stricken out, and asked this jury to draw inferences and come to conclusions on the basis of such points.

The Court: Just pause there and point out to me the instances you have in mind, and I will rule on them. A blanket objection is not very enlightening. Just point out what you have in mind.

Mr. Multer: I have in mind his reference to the fact that only the Governor can give these convicts who testified here any immunity. 3938

The Court: What he said was, "It is only the Governor of the State who can cut down their sentences." That is true, isn't it?

Mr. Multer: Not entirely. There is a Parole Board that has something to do about it. Both the Parole Board and the Governor can take the recommendations of the District Attorney.

The Court: The District Attorney's statement will be amended by what you just said.

Mr. Multer: I take an exception. I don't think that cures the error.

3939

The Court: All right; your exception is noted. Proceed.

Mr. Multer: The clear proof in this record is that Indovino was not well known in Coney Island—he was not known in Coney Island.

The Court: That is for the jury to say as to whether the argument of the District Attorney is substantiated by the evidence. Proceed, please. I will not have a second summation under the guise of objections; if that is what you have in mind. Proceed, please.

Mr. Multer: I have some six or seven pages of notations I gathered of comments made by

3940 *Defendants' Objections to Summation by District Attorney*

the District Attorney during the course of his summation. If you want me to put them on the record out of the hearing of the jury I will do it. If you want me to do that in the general fashion that I have already put it, I will rest on that, if you are satisfied.

The Court: I will tell you what we will do, if it is satisfactory to you. I will send the jury out to lunch now, let you put your objections on
3941 the record; but the difficulty is that if I sustain your objection the jury, of course, may not have the benefit of it. So go ahead and make them now and I will rule on them.

Mr. Multer: I object to his statement that there is nothing in holding these defendants for sixty hours or more without arraigning them.

The Court: That is sustained.

Mr. Multer: I object to his statement that there was no burden on the defendants to call Assistant District Attorney Heffernan as a witness on their behalf.

3942 The Court: That is sustained.

Mr. Multer: I make the same objection on behalf of the defendant Indovino as to the persons known as Mrs. Spielfogel and Mrs. DiPisa. No burden on his part to call either one of those witnesses.

The Court: The defendants are under no burden to call any witnesses or even to take the stand in their own behalf. They are under no burden to establish their innocence in any-wise, shape, form or manner. The burden always rests upon the shoulders of the prosecution Proceed.

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Mr. Multer: There is no proof here that Levine was or is in any hospital.

The Court: The only proof is, if it be proof (and that is for the jury to say) that the last time that the sister heard from him she thought he was in England.

Mr. Multer: There is no proof in this record that Indovino was hungry for money.

The Court: That, I am going to submit as a question of fact for the jury.

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Mr. Multer: Exception. I now direct your Honor's attention to the District Attorney's reference to the Daily News about rewards. That was highly improper.

The Court: The jury will disregard it. But there is evidence that Rudish—if I am correct as to the individual—said to one of the fellows this: "Well, Valentine will be paying out a new C note tomorrow."

Mr. Carabba: That statement—

Mr McGough: I think your Honor meant Malinsky.

3945

The Court: Malinsky: yes.

Mr. Multer: Must not be considered in any way against Indovino.

The Court: That is so. I will charge the jury in clear language along that line, when I come to charge.

Mr. Multer: I object to the District Attorney's several references to Leon Fox as listening to the testimony and being here in spirit, and as to directing the jury's attention to sympathy, about Leon Fox's body out in the cemetery.

The Court: Sustained. That applies to both

3946 *Defendants' Objections to Summation by District Attorney*

sides, of course. An appeal made for sympathy for the deceased is not proper, and any appeal made to turn out either one or more of these defendants because they have wives or because they have children—that also was improper. It works both ways. When I say "turn out" I mean to declare them guilty or not guilty. That is what I mean by "turn out". I am not referring to the recommendation part of the stat-
3947 ute, to which I shall make reference during my charge. It may or may not be considered by the jury on the question of recommendation. I am merely talking about the question of guilt or innocence, so the record will be straight on that.

Mr. Multer: Of course, each time your Honor has said "sustained" to one of my objections, the jury understands that those remarks should not be considered by them in anyway.

The Court: That is true.

Mr. Multer: The reference to immunities, promise or lack of promise of immunity, would
3948 in no event be binding upon the District Attorney, and the District Attorney therefore should not have commented upon it, referring to a promise of immunity to the three convicts or to some of them.

The Court: The jury will be guided solely by the evidence in the case.

Mr. Multer: There is nothing in this record from which this jury could infer that Mr. Geoghan gave to Indovino the word "fiancee", and the reference to that inference is improper.

The Court: There is nothing in the record, that is true. The jury is instructed to disregard the comment of the District Attorney that

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Mr. Geoghan is the one who supplied the word, if the word was supplied. Your objection is sustained and the jury is instructed to disregard it.

Mr. Multer: The District Attorney's statement or reference to the giving of statements to counsel which were made by witnesses, was improper and prejudicial; because under the rule which your Honor has been following, regardless of the District Attorney's consent, you 3950
first examine these statements and you do not give them to defendant's counsel unless you find something in them contradictory of the witness's testimony.

The Court: The point, as I understand it, that Mr. McGough made (and if I am wrong there, correct me) was that Mr. Solovei asked for the production of the statement of Yellin, and also asked for the production of the statement of the witness Shamin, and that the District Attorney did produce the statements, and that Mr. Solovei had both of these statements and read them. The 3951
argument of the District Attorney, if I understand it correctly, is that if there were any discrepancies—in other words, if what either or both of these witnesses told the District Attorney in the presence of a stenographer contradicted anything they testified to here, Mr. Solovei had the opportunity to bring it out. That, I understand, is your argument, isn't it, Mr. McGough?

Mr. McGough: That is right.

The Court: Your objection is overruled.

Mr. Multer: Exception. There is nothing in this record from which this jury can draw any in-

3952 ference that Indovino was not legitimately employed.

The Court: That is argument. One side argues he was legitimately employed. The other side argues he was not legitimately employed. It is for the jury to weigh that, and I am not the jury.

Mr. Multer: That is all.

Mr. Solovei: May I just join with Mr. Multer and have the same objections and take an exception?

3953 The Court: Same rulings.

Mr. Solovei: The same force and effect as if I made them.

Mr. Meadow: Yes; same—

The Court: That also applies to your client. So the record will be amply protected, same rulings in each case.

Mr. Solovei: I again move for the withdrawal of a juror.

The Court: You are making a motion? All right, then—this motion business is silly—

3954 Mr. Solovei: I disagree and take an exception.

The Court: Wait. When I say "wait", you hear and be silent (striking gavel)—don't you try to out-shout me.

Mr. Solovei: Nobody is trying to out-shout you. I made my motion.

The Court: When I ask you to wait you stop, now. Stop and please take your seat and be a little more respectful to this Court. Please be seated.

Mr. Solovei: Am I not respectful? When you talk to me I have to rise.

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The Court: I am asking you to please take your seat.

(Mr. Solovei takes his seat).

The Court: Now, I have said that your continuous motion for the withdrawal of a juror is silly. I withdraw that remark. The remark was not intended to be offensive to counsel or to prejudice him in any way in the eyes of this jury. What I meant to say was this, that the record is so amply protected by your continuous motions 3956
for mistrials, which you have a right to make; the repetition of the same is entirely unnecessary. Now that settles that. If you have any other motions to make, make them. Proceed, please.

Mr. Morritt: Just one more.

The Court: Just a minute. I want to give Mr. Solovei full opportunity to make any other motions he desires.

Mr. Solovei: I have no more motions.

The Court: You may again address the Court, Mr. Morritt.

Mr. Morritt: I ask the Court to charge the 3957
jury—

The Court: No, no; I am not charging any jury now. Please be seated.

Mr. Morritt: This is on the summation, your Honor.

The Court: Go ahead; make your objections to the summation, without asking me to charge.

Mr. Morritt: All my remarks are towards the summation. I ask your Honor to charge the jury that the remark made by Mr. McGough in his summation, that the action of the detectives in the Hotel Bossert was only to scare the defendant Malinsky; was highly improper, and illegal, and

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that the actions of the detectives in even trying to scare, would be illegal and contrary to law. If your Honor wants the exact language of Mr. McGough, I will give it to you.

The Court: No; I have a recollection.

Mr. Morritt: That he was going to get a shellacking.

The Court: That referred to Malinsky, did it not?

3959 Mr. Morritt: Yes, your Honor.

The Court: How are you interested in defending Malinsky?

Mr. Morritt: I take this attitude that what hurts one here hurts all three, because of the conspiracy alleged in the indictment.

The Court: That is your point?

Mr. Morritt: Yes, your Honor.

The Court: Does Malinsky's counsel make an objection?

Mr. Solovei: I made my objection on record.

The Court: Do you join in the objection made

3960 by Mr. Morritt?

Mr. Solovei: I will modify it in this respect: In view of the District Attorney's remarks about McNally talking about Malinsky or scaring him or giving him a shellacking, that I again make my application for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied. (To Mr. Morritt): Your motion is denied too.

Mr. Morritt: I respectfully except.

The Court: The evidence was received solely with reference to Malinsky and not with reference to Indovino, whom I think you represent, don't you?

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3961

Mr. Morritt: No, sir; Rudish.

The Court: All right. (To the jury): Gentlemen, I am going to declare a recess now for luncheon. I am going to ask you not to discuss the case under any circumstances among yourselves, or with any other person, or permit anyone to speak to you about this case, or discuss it in your presence. You have not heard the charge of the Court on the law that governs this case, therefore you are not in any position to act upon the evidence and the summations. You must still reserve decision and not form or express any opinions or conclusions as to the guilt or innocence of these defendants on trial or either or any of them until the case is finally submitted to you for your consideration. You will retire now and return at 1:30 p. m. Be in these seats at 1:30, please, and you will receive the charge of the Court.

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(The jury retired from the court-room).

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Mr. Solovei: I move to strike out whatever colloquy there may be in the record that may have seemed unpleasant. That is no part of the record and arose merely in the heat and conflict of the trial.

The Court: Motion granted.

(Recess until 1:30 p. m.)

3964 AFTER RECESS. TRIAL RESUMED.

1:30 p.m.

Charge to the Jury

The Court: Mr. Foreman and gentlemen of the jury:

The Court desires at the outset to express its thanks and appreciation to you gentlemen for the public-spirited manner in which you have
3965 devoted your time and attention to your duties in this case. No greater responsibility can be delegated to a citizen, other than serving his country in the time of national peril, than that of acting as a juror in a criminal case.

This, gentlemen, is a community of law and order. It is otherwise in other benighted, dark corners of this world. There people and their rights are the pawns of despots and tyrants. Here in this glorious land our laws guarantee our citizens full protection in the enjoyment of their lives, their liberties and their property. Our laws also guarantee to an accused a fair
3966 and impartial trial, and that his life or liberty shall not be forfeited unless his rights are zealously guarded and his guilt established according to law.

This tribunal, gentlemen, is constituted of two component parts, namely, the Court and the jury. The law defines their respective duties, obligations and limitations. The Court is chargeable with the duty of defining and administering all matters that concern the legal aspects of the trial; for instance, to rule upon the admissibility of evidence, to rule upon objections and motions, and to instruct the jury on the law applicable

to the case; and, finally, to render judgment after the jury shall have reported its verdict.

On all matters of law the Court is supreme. You are in duty bound under your oaths to accept the law as charged by the Court. No juror has any right to refuse to follow the law as charged by the Court, regardless of his own private opinion of the wisdom of such law. Under our democratic way of life, laws are enacted by our duly elected representatives in the legislative halls at Albany. The laws so enacted are 3968
the will of the people. They are binding upon all of our citizens. They govern the man on the banks of the St. Lawrence as well as the resident at the tip of Long Island, at Montauk Point; and every one of the millions of persons in this Empire State of New York.

Therefore, a juror who arrogates to himself the unwarranted privilege of amending the law in the jury room, by his refusal to follow the law as charged by the Court, is not performing his sworn duty as he should. He is not a good citizen. He must under such circumstances be unfair to the People or unfair to the defend- 3969
ants, and definitely recreant to his oath.

I have confidence that you gentlemen are mindful of the solemnity of your oaths and that you will accord the defendants as well as the People a fair and impartial trial and will follow and apply the law as charged by the Court.

I have spoken of the functions of the Court. Now I will explain the duties of the jury. You gentlemen of the jury are the sole and exclusive judges of the facts in the case, the credibility of the witnesses, and the weight and sufficiency of the evidence. In that regard you are supreme.

3970 The Court has no right to trespass upon your jurisdiction as the triers of the facts and the judges of guilt or non-guilt.

The Court has seen fit to deny motions made by the respective counsel to dismiss the indictment and to direct acquittal. The denial of these motions was not a declaration by the Court that it believed the defendants to be guilty; it was not an indication or opinion by the Court that they are innocent. It was a ruling upon a ques-
3971 tion of law, with which the jury should have no concern, and which must not play any part in its deliberations. The Court has indicated no opinion one way or the other. The Court, as far as this jury is concerned, has no opinion as to either guilt or innocence. If any juror should harbor any opinion that the Court believes a defendant guilty or believes a defendant innocent, it would be his bounden duty to disabuse his mind of such notion. To do otherwise would do injustice either to one side or the other.

Sometimes in the course of a protracted trial, especially with the weather so unbearable and
3972 hot as it has been during this entire trial, and especially when jurors and counsel and Court and witnesses are in an uncomfortable court-room, nerves sometimes become strained. Sometimes a Judge will speak sharply, as I have done on several occasions, to one or more of the counsel in the case or to a witness, in the maintenance of orderly procedure. Jurors, who are laymen and generally unfamiliar with the daily routine of the court-room, may feel that counsel or the witness has incurred the displeasure of the Court; that counsel or the witness has wil-

fully misconducted himself. An unthinking juror might be prone to permit such occurrence to redound against the interests of the defendant represented by such counsel, or against the defendant's witness. Let me caution you gentlemen not to fall into such error. The District Attorney is not on trial here; these lawyers are not on trial here. Whether the verdict be of one kind or another, when this trial is over all counsel will go back to their offices and homes, and on the morrow turn their respective attentions to the next case. But these defendants 3974
are on trial, and a verdict for or against them must be based on the evidence and the evidence alone, untainted by any prejudice against or sympathy for either them, their counsel, their witnesses or their evidence.

It is also well for a juror to be on guard in a case such as this lest prejudice may, even unconsciously, be cast into the scale against a defendant. The crime of which these defendants stand accused is likely to shock the feelings and the conscience of any citizen. It is charged here 3975
that an officer of the law was ruthlessly slain by a band of robbers, while attired in his full uniform and in the performance of his duty, on the public streets in our borough, while guarding a citizen who was on his way to deposit some money in a banking institution. It is of especial importance in a case of such nature to be doubly careful not to permit the nature of the crime charged to deprive, even to the extent of one iota, an accused of his rights to a scrupulously fair and impartial decision on the evi-

dence at the hands of the judges of the facts in the jury room.

Each defendant on trial has a prior criminal record. Indovino has served a term in prison for attempted robbery. Rudish has served a prison term for unlawful entry and has also been convicted of assault in the third degree. Malinsky has also been in prison, convicted, I believe, of robbery. You have no right to be prejudiced against these defendants or either of them
3977 because they are ex-convicts and/or parolees. The fact that a man has a criminal record is no evidence whatsoever that he is guilty of the crime for which he is presently standing trial. The only bearing a prior criminal record has is that it may be considered by the jury in weighing the defendant's credibility when he takes the witness-stand in his own behalf.

With the definite desire, gentlemen, and the capacity to do even-handed justice, we will now consider some principles of law that govern this case.

3978 The defendants on trial have been indicted by the Grand Jury and accused of murder in the first degree. The indictment is a mere charge or accusation. It is not evidence. It has no probative force. It does not even create a suspicion of guilt.

Each defendant under our law is presumed to be innocent. That presumption attends him throughout the entire trial. It abides with him while you are deliberating upon his case in the jury room. It entitles him as matter of right to an acquittal unless the People have fully met

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the requirements and standards provided by law. They are these:

The burden of establishing guilt rests upon the shoulders of the People, the plaintiffs in this case. That burden of proof never shifts to the shoulders of the defendant to establish his innocence. A defendant is at no time under any duty to prove his innocence.

The law further provides that his guilt must be proven by credible evidence and beyond a reasonable doubt. I shall have more to say to you about the meaning of reasonable doubt later in my charge.

3980

If the People fail to prove the defendant guilty beyond a reasonable doubt he must be acquitted. That is his absolute right. If his guilt is so established, he should be convicted. That is an absolute right that belongs to the People.

At the conclusion of the testimony you were privileged to listen to what I consider to be brilliant addresses by the learned counsel for the defense, as well as to a brilliant address by the learned counsel for the People. You are at liberty to accept the arguments presented, when they square with your recollection of the testimony. If, however, the inferences which they ask you to draw are not fairly deducible from the credible evidence in the case, you must pay no attention to their deductions.

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Bear in mind that your recollection of the testimony and yours alone prevails over that of counsel and even over that of the Court. If at any time while you are deliberating, you should be uncertain as to the testimony given by any or all witnesses, you may return to the court-

3982 room and, at your request, the Court will have such testimony read to you, so that your recollection may be refreshed.

At times, during the course of this trial, the Court asked questions of some of the witnesses and of the defendants. You must not attach undue importance to the questions asked by the Court, nor are you to assume that for that reason the Court has any opinion as to the facts.

3983 The defendants on trial have been indicted by the Grand Jury of Kings County and accused of the crime of murder in the first degree. The alleged crime is described in the following language in the indictment:

"The defendants on or about February 15, 1941, in the County of Kings, acting in concert with Abraham Beitler, deceased, wilfully, feloniously and of malice aforethought shot and killed Leon Fox with a pistol."

This is a form of indictment which permits the prosecution to establish what is known as
3984 a felony murder. I will explain to you in detail the meaning of felony murder during my instructions. Before doing so, however, I must direct your attention to several sections of our Penal Law concerning the proof that must be adduced in every murder case.

By Section 1042 of the Penal Law, homicide is described as follows:

"Homicide is the killing of one human being by the act, procurement or omission of another."

Homicide is divided into four classes, two of which are criminal and two of which are not criminal. The criminal homicides constitute

murder and manslaughter; the non-criminal homicides encompass justifiable homicide and excusable homicide.

We are concerned in this case solely with the crime of murder in the first degree.

No person can be convicted of murder unless the death of the person alleged to have been killed and the fact of the killing by the defendant as alleged are each established as independent facts, the former by direct proof and the latter beyond a reasonable doubt. By "the 3986
former" we usually mean the corpus delicti; that is to say, the death of the person killed must be proved by direct evidence. If Leon Fox is not dead, then the entire case against these defendants collapses. There does not seem to be any dispute in this case that Leon Fox is dead. You have the testimony of the brother of the deceased, who identified his corpse in the morgue to Dr. Marten the Deputy Chief Medical Examiner of the City of New York. On the question whether Leon Fox was slain—in other words, whether he met his death as the result 3987
of a criminal agency, and also the cause of death—you may consider the testimony of Dr. Marten. The doctor testified in substance that he autopsied the body; that his examination disclosed one bullet hole which went through and through, entering Fox's upper right chest and piercing the upper lobe of the right lung and causing very serious hemorrhage, which resulted in his death. The doctor described this wound as the more serious of the two which he found. The other wound was caused by a bullet which entered the lower part of the chest wall on the

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left side and perforated Fox's bowel and spleen. This bullet which caused this second wound was recovered by Dr. Marten from Fox's body at a point near the fourth lumbar vertebra in the back. The doctor also testified that this second bullet wound could also be a competent and producing cause of death.

Gentlemen, the second requisite, set forth by the statute referred to, is that the prosecution must prove the fact of the killing by the defendants beyond a reasonable doubt.

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Murder in the first degree is defined by our law in the following language:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed (1) from a deliberate and premeditated design to effect the death of the person killed or of another, or (2) the killing of a human being, unless it is excusable or justifiable, when committed without design to effect death, by a person engaged in the commission of or in the attempt to commit a felony upon the person killed or otherwise."

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These defendants, gentlemen of the jury, you must bear in mind, are not being prosecuted here for premeditated murder. They are being prosecuted under this subdivision of the statute defining murder commonly known as "felony murder." For the sake of clarity I direct your attention to the language of the pertinent part of the section:

"The killing of a human being, unless it is excusable or justifiable, when committed without a design to effect death, by a person engaged in the commission of or in an attempt to com-

mit a felony upon the person killed
wise," is murder in the first degree.

We have here three defendants, a
of this felony murder. It is charg
prosecution that Fox was killed by
plice of those defendants named
Beitler and/or by one of the defendan
trial. It is the contention of the p
that Fox was killed while all of the
and Beitler were mutually engaged
mated in the commission of the crime
or an attempt to commit a robbery.

For the purpose of this case, gentle
jury, it makes no difference whether
acts were committing a robbery or
to commit a robbery at the time of
Nor does it matter what degree of
involved, since each of these crimes
the attempt to commit robbery, in
constitutes a felony under the provi
Penal Law.

What is robbery?

"Robbery is the unlawful taking
property from the person or in the
another against his will, by means
violence or loss of injury, immediate
to his person or property."

There are three degrees of rob
which are felonies, but I do not deem
to set forth the law applicable to ea
degrees. Robbery consists of tw
crimes. First, the assault, which is th
use of force or violence against the
another; and, second, larceny, which i
of personal property from the posses

other with intent to deprive him of its use and benefit.

You will observe that the intent to steal is an essential element of the crime of robbery.

Robbery in its first degree is the taking of property from the person or in the presence of another by the use of force or fear, against that person's will, when the robber is armed with a dangerous weapon or aided by an accomplice actually present, or being aided by the use of an
3995 automobile or motor vehicle, or when the robber inflicts grievous bodily harm or injury upon the person from whose person or in whose presence the property is taken, or anyone in his company at the time, in order to accomplish the robbery.

An attempt to commit a crime is defined as follows:

"An act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime."

An attempt to commit a robbery in any of its degrees is likewise a felony.

3996 To convict these defendants of felony murder, therefore, the prosecution is required to prove just two things: First, that the defendants were mutually engaged, aiding and abetting and assisting each other in the commission of a robbery or in the attempt to commit a robbery; and, second, that while thus engaged their accomplice Beitler and/or either of them killed Leon Fox, even though the killing was unintentional.

If one of the defendants at the time in question was engaged in the commission of the crime of robbery, or was engaged in an attempt to commit a robbery, not only he but also anyone else aiding

and abetting and assisting him in the commission of the robbery or in the attempt to commit that robbery, is equally guilty of robbery or an attempt to commit robbery; since under Section 2 of the Penal Law an accomplice who is aiding and abetting and assisting a principal in the commission of a crime is himself a principal and hence equally guilty of the crime.

If, gentlemen of the jury, the defendants were aiding and abetting each other in the commission of a robbery or an attempt to commit a robbery, then from beginning to end they are all engaged in a common crime. A homicide committed by one of them or their accomplice, while so engaged, was within their common purpose, and all would be principals throughout. What one did, therefore, they all did, in the eyes of the law. A shot by one of the defendants or their accomplice Beitler, while thus engaged in the commission of a common crime, was an act attributable to all of the defendants, and all are equally responsible. Whether or not their minds met in the act of the shooting—that is to say, whether or not they all had agreed and consented to the shooting and the killing—makes no difference as long as they all had agreed in the commission of the robbery or the attempted robbery in question, and were aiding and abetting each other in the furtherance of their common purpose when the killing took place. I think, gentlemen, that is plain language. I think, gentlemen, that is not hard to understand. That, gentlemen, is the law of the State of New York, by which all of us, including these defendants,

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4000 are bound; and that is the law which you must follow.

Of course, gentlemen, from the instructions I have given you during the course of this charge, it is obvious that if, at the close of your deliberations, there still is in your minds a reasonable doubt that one or another of the defendants has been shown or proven to have been an accomplice in the robbery alleged by the prosecution, then your duty will be to acquit the defendant con-
4001 cerning whom you entertain such reasonable doubt.

In conclusion, gentlemen, let me read you a very plain and concise statement of the law as defined by the highest court of our State:

"If the defendants were associated in the crime of robbery or attempted robbery, and the homicide was committed in furtherance of their common purpose by any one of them, all his associates present, or at hand, and aiding and abetting in the perpetration of the lesser felony, would be equally liable for murder in the first degree. And
4002 so, where a number of persons are acting together in the commission of a felony, a homicide perpetrated in the furtherance of the felony is deemed to be within the common purpose, and all alike are responsible in law therefor."

Such, gentlemen of the jury, is the responsibility which our law places upon all who are associated in the commission of a felony when one of their number kills a human being even by shooting without any design to effect death.

The Court is about to make reference at some length to the evidence in the case, in order to lead your minds along investigational channels and

thus better to understand the application of the principles of law pertaining to this case. I have already called to your attention that guilt or innocence must be decided strictly on the evidence in the case, and I deem it of importance to remind you what may not be considered as evidence in the case.

For example, all offers of counsel to prove things which were not proved or which were not admitted in evidence by the Court, and all arguments of counsel addressed to the Court on ques- 4004
tions of law, or motions for the exclusion or admission of evidence, as well as any matters stricken from the record which you were instructed to disregard, should be disregarded by you and given no weight and consideration whatever in your determination of the guilt or innocence of these defendants. You are to consider only matters legally admitted in evidence.

It is contended by the prosecution (with what force and effect, of course, it is for you to determine as judges of the facts) that on the evening of February 15, 1941, Leon Fox was slain by one 4005
or more of a band of robbers, all engaged in the attempt to commit or during the commission of a robbery.

The People, in order to sustain this contention, have summoned several witnesses to the stand. The Court is about to marshal the evidence concerning this feature of the case. The Court will not refer to each and every bit of testimony. To do so might unduly prolong this charge. However, with these witnesses, as with all other witnesses, both for the prosecution and the defense, who gave testimony, your verdict must be based

upon all of the testimony elicited both on direct as well as on cross-examination, in arriving at your determination.

Herman M. Dolinsky testified that on the day in question he was the manager of Loew's Theater located on Surf Avenue, on the corner of Stillwell Avenue, in the Coney Island section of Brooklyn. At or about eleven o'clock in the night, after he had placed the sum of seven hundred dollars in bills and seventy dollars in quarters into a
4007 canvas bag (money constituting the day's receipts in his box office), in company of Patrolman Leon Fox he set out along Surf Avenue, on the northerly side thereof, and walked in an easterly direction on the way to a night depository of the Brooklyn Trust Company located there in the vicinity. They walked along Surf Avenue as indicated, reached the corner of 12th Street, and cut diagonally across Surf Avenue in the direction of the bank, which is located on West 12th Street between Surf Avenue and the water-front, on the easterly side of the street. As he was crossing,
4008 Dolinsky observed an automobile parked some distance from the curb, facing north, lights out, and door open. As they walked along the 12th Street side toward the bank, and had reached the point opposite the parked car, with Dolinsky nearest the curb and Fox beside him toward the building line, a man suddenly leaped out from the interior of this parked car, pushed against Dolinsky, causing him to lurch forward, and then this man leaped at Fox. Dolinsky heard three shots ring out. He looked back and saw the policeman fall. Dolinsky then heard a voice call out, "Drop that bag or I'll drop you." Dolinsky

threw the bag down, the man picked it up, and with it leaped back into the automobile, which immediately sped away. It went north cross Surf Avenue and toward Neptune Avenue. Officer Fox, now on his back, fired approximately six shots as the so-called holdup car sped away from the scene. Police arrived soon after and took charge of the injured officer and removed him in a radio car to a hospital. Dolinsky says he is unable to identify the assailant or assailants.

At this point I charge you, gentlemen of the 4010
jury, that his failure to identify the culprit or culprits, does not necessarily, and solely because of this reason, require the acquittal of these defendants as a matter of law, provided from the credible evidence in this case you are satisfied of their guilt beyond a reasonable doubt. If it were the law that this case necessarily falls because there is no identification of the defendants, as a matter of law I would have dismissed the indictment and would have taken the case from the jury. Now, gentlemen, that is clear, is it not?

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Dolinsky does, however, identify the holdup car, which was later discovered on a nearby street.

You will recall the witness Max Kallman, the young man who testified that while seated in his automobile waiting for the light to change, on the corner of West 12th Street and Surf Avenue, he heard two shots. He left his car, heard some more shooting and then observed the automobile speeding across Surf Avenue, on West 12th Street, going north. He also identified the so-called holdup car, later said to have been found on Stillwell Avenue.

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Officer Rabbitt and Sergeant Bremeier were the two radio policemen who were summoned to the scene by Kallman. They removed Fox to the Coney Island Hospital.

Officer Corboy testified that he discovered the alleged holdup car abandoned on Stillwell Avenue opposite No. 2844. He described the condition of the car. He testified that the front and rear license plates were bent forward and that the ignition wires had been crossed and cut and

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jumped. It was he who phoned the police station and then returned to the alleged holdup car. Then he discovered a hole in the right front fender and another mark on the hood, which this police officer gives as his opinion were caused by bullets coming in contact therewith. It was he who testified that he found this brown fedora hat marked in evidence by the prosecution, under the motor and between the two front wheels of this alleged holdup car.

Detective Edward Basch testified that he received the hat from Officer Corboy at 1:10 a.m. at the scene of the shooting.

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Private Benjamin Glodowsky is the young soldier who appeared here. He testified that after hearing two shots he ran to the corner of 12th Street and heard five or six more shots. He testified that he heard Dolinsky call for help, saw the patrolman lying on the sidewalk, and observed the fleeing car and later identified it.

Julius Gimbel, employed by the E. W. Bliss Company, swore that while he was on Surf Avenue, on the north corner of West 12th Street, he heard gunfire and saw gun flashes off 12th Street. He testified that there were between five and

seven shots in all; that the alleged holdup car sped by him only fifteen feet away; that he observed three men in the car, two in the front and one bent over in the rear. He gave it as his testimony that the man that operated that car was a short man and that the man in the rear was a thin man with hair polished back. He also testified that he later identified the holdup car.

Detective John Trusch, a ballistic expert of the Police Department, testified that he examined the wounded officer's overcoat and found a bullet 4016
hole on the left front side that was powder-marked. He gave it as his opinion that the gun that fired that shot was only six or eight inches away at the time.

From all of the evidence referred to, as well as the testimony of the medical examiner, are you gentlemen of the jury satisfied beyond a reasonable doubt that a robbery was in progress on West 12th Street on the night in question, during the commission of which robbery, or in the attempt to commit the same, Leon Fox was shot and killed by one or more of the robbers en-
gaged in this alleged nefarious undertaking? If 4017
you are so satisfied beyond a reasonable doubt, every accomplice who had a criminal hand in the perpetration of this robbery or attempted robbery, in the course of which the officer was slain, is guilty of murder in the first degree, regardless of which accomplice or accomplices fired the shot or shots that brought about Fox's death, and also regardless of whether the person or persons who shot Fox, or any of their accomplices, intended to kill him.

Of course, if you gentlemen have a reasonable

doubt that a robbery was committed at the time and place specified, or that an attempt to commit the crime of robbery was in progress—in other words, if the independent felony other than the homicide has not been proven, then I charge you that you must acquit all the defendants. On the other hand, if you do find as a fact beyond a reasonable doubt, not only that a robbery or an attempt to commit a robbery was committed, and during the commission of which Fox was slain,
4019 then, as I have indicated, all of those concerned in the commission of the robbery or attempted robbery are guilty of murder in the first degree, and nothing less.

You are now confronted with the problem of determining the guilt or innocence of the defendants on trial. The charges made against these defendants must be considered separately as against each defendant. These defendants are tried together as a matter of convenience, but each one of them is entitled to have you gentlemen do this: decide the case solely on the evi-
4020 dence that was received by the Court as binding upon that particular defendant.

Let me draw a mental picture here by way of illustration, because this is so important to these defendants. We will imagine there are three retorts or vessels set up before you on that railing in front of the jury box. Each one is labeled for a particular defendant in the case. You will be the chemists. When the case is finally closed you start the distilling process. You distill away all the impurities from each of these vessels, and you leave in each of these vessels only the clear liquid which we will call the credible

evidence. For the purpose of further illustration we will now set on that railing three glass measures of equal size. Once again each glass measure will be labeled for a particular defendant. On the side of each of these glass measures is a horizontal marking which we will call "reasonable doubt". You as the chemists shall pour the distilled liquid called "credible evidence" from the retort that belongs to a particular defndant into the glass measure that belongs to the same defendant. If the credible evidence 4022
in that glass of that particular defendant fails to rise above the reasonable doubt level, you must acquit that defendant. You may not ladle evidence out of a retort or glass that belongs to another defendant into a glass that belongs to a particular defendant that you are having under consideration. In other words, you cannot help yourself to evidence that is adduced against another defendant for the purpose of convicting the particular defendant whose guilt or innocence you are considering at the time. The case against the particular defendant must 4023
stand or fail on the credible evidence only as it applies to him, and not otherwise. Conversely, if the required standard is met—that is, if the credible evidence surpasses the level marked "reasonable doubt" you must convict him. You have no right to acquit him solely because some other measure was filled beyond the level of reasonable doubt to such an extent as to be overflowing. It is sufficient if the credible evidence as to any defendant reaches beyond the level of the glass marked "reasonable doubt".

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Such is the essence of the term "beyond a reasonable doubt".

Each case stands on its own bottom regardless of the condition of the evidence in the other defendants' cases.

Has Indovino's guilt been established beyond a reasonable doubt? Has the credible evidence in his case passed beyond the mark which is used symbolically here to designate reasonable doubt? If it has then he is to be convicted, re-

4025 gardless of the state of the other cases as affecting the other defendants.

Then you go to the case of Rudish and follow the same procedure.

Then you go to the case of Malinsky and follow the same procedure.

Now, gentlemen, I shall review the evidence in the order of summations of counsel, solely for the sake of convenience.

The defendant Joseph Indovino, by this indictment, stands here accused of murder in the first degree. Of course, as against him you will

4026 consider the testimony offered by Dolinsky and the other so-called Coney Island witnesses who testified concerning the alleged holdup and killing of Fox.

It is apparent that the Coney Island testimony to which I have just made reference does not tie up the defendant Indovino with the commission of the alleged crime. As to his alleged culpability we must resort to the testimony offered by the prosecution witnesses David Yellin and Samuel Kovner.

David Yellin was called to the witness-stand by the District Attorney. He testified that he

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is at present a Sing Sing convict serving a sentence of ten to twenty years for armed robbery; that he has been in prison since December, 1941; that he was also convicted of assault in the third degree, a misdemeanor, in 1937, arising out of a charge that he had sexual intercourse with a female under the age of consent, and in which case he was put on probation.

What I am about to say to you with reference to this convict's criminal record will apply to each and every other witness who took the stand.

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I have already instructed you that you are the sole and exclusive judges of the facts in the case, which implies that you are also the sole and exclusive judges of the credibility of witnesses who testified to the existence or nonexistence of facts. It is you, as the sole judges of the facts, who give weight, fix value, and attach credence to the testimony of any and all witnesses, in the degree you think it merits. When you shall have come to the conclusion as to what witnesses have told you the truth you will have gone a great distance toward rendering a just verdict.

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In determining the credibility of a witness you must rely upon your own recollection of the testimony and your common sense. Every day, gentlemen, in the course of ordinary life, in connection with your own businesses, you are called upon to determine whether or not people making statements to you are trustworthy and reliable or not, and you judge of the credibility more or less instinctively. In passing upon the credibility of the witnesses, you have a right to consider what if any motive, interest, bias or

4030 prejudice, or the absence of any of these has actuated the persons testifying. You consider their relation to the case or any part of it, their interest in the case or its result, or their interest in or relationship to any of the witnesses or to the defendants in the case. You may consider the manner in which the answers to questions were given. You may consider whether they are corroborated by the facts you believe have been established. You may consider
4031 whether they have been acting in an honorable or upright way, or otherwise.

The testimony of a witness should not be arbitrarily rejected. If any inconsistencies or doubts appear in the testimony of a witness, it is your duty to reconcile the conflicting testimony and to resolve such doubt if you can. Some differences and some inconsistencies sometimes arise in the most innocent way, and you may say whether they are due to an honest mistake, or whether they are the result of deliberate falsehood. Where such reconciliation is impossible, you have a right to cast aside the irreconcilable part
4032 of the testimony—not necessarily as false—and accept that portion of it that you believe to be true.

If a person has given testimony or has made statements which are inconsistent with the statements made on the witness-stand and with established facts, the jury may consider that as bearing upon the truthfulness of the witness in question, and value, weight and probative force of his testimony. But whenever you find and believe that any witness for the People, or any witness for the defendants, or the defendants themselves as witnesses, have wilfully testified

falsely in any material particular, you are at liberty to disregard that witness's entire testimony, although you are not bound so to do. You may, where the facts and the belief of the jury warrant it, just reject that part alone that is false and accept that and give credence to that part which you believe to be true.

All testimony ought to be carefully analyzed and considered in determining whether to accept it; and its credibility determined by these common tests of which I speak, or such others as may appeal to your sound judgment. 4034

The law contemplates that you shall apply the same common sense methods, in the consideration of the testimony of the witnesses, that you do in your own affairs. You are not to adopt a fantastic or unnatural course or method in the jury room that you would never dream of acting upon in connection with the solving of the important affairs of your life.

You may, therefore, consider, on the question of credibility, the criminal record of each and every witness who has one, in determining whether or not his credibility has been impaired in your judgment, and to what extent. 4035

Now to return to Yellin's testimony. He testified that he has known Malinsky since the summer of 1940, Rudish for twelve to fifteen years, Beitler for fifteen years, and Indovino since the Tuesday or Wednesday before the Saturday of February the 15th, when Fox was allegedly killed. He testified that he was on his way to his home on the East Side, when, at or around 5:30 to 6:00 p.m., while he was on First Street near Avenue A, he was hailed by Beitler, who was standing there in the company of the de-

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fendant Joseph Indovino. He testified that Beitler introduced him to Indovino as "David Yellin, a friend of Slip's." Slip, you will recall, is the witness named Nathan Spielfogel. Beitler introduced Indovino to Yellin as "Joe Tiger". Beitler then said, according to Yellin, "This fellow", meaning Indovino, "has got something good out in Coney Island." Indovino then spoke up about "the job in Coney Island"; that the manager of the theater would take the day's

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receipts to a nearby bank; that the neighborhood was very deserted; that the money was carried away from the theater about 11:00 p.m.; that the manager would be escorted by a policeman, but that that should not cause much concern because he, the policeman, was not "looking to get killed". Indovino also mentioned the street on which the car to be used in the holdup was to be parked, and advised Beitler and Yellin that the "take" would be one thousand dollars. Indovino also said he could not "go on this trick" because he was too well known out in that section of Coney Island. After Indovino had al-

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legedly given these details to Yellin, Beitler then spoke up and directed Yellin to communicate with Slip that night and tell him that he, Beitler, wanted him "to go on the thing with him", and also directed Yellin to give all of the details to Slip.

Yellin testified that he told Beitler that he would do as requested, and then left Beitler and Indovino. That evening, Yellin continues, he saw Slip on the corner of Avenue D and 7th Street, and delivered the message. Slip said he refused to go out on any job which Joe Tiger was connected with. That, I believe, is the sum

and substance of the testimony of Yellin in so far as it may affect the defendant Indovino.

I charge you, gentlemen of the jury, that Yellin is an accomplice as a matter of law, and even if you should believe Yellin's testimony concerning Indovino, as related by him, to be true in all of its essential elements, you would nevertheless have no right to convict him unless the requirements of the law that I am about to give you have been fully met.

These requirements have taken the form of a 4040
statutory mandate. Section 399 of the Code of Criminal Procedure provides:

"A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

The statute is not satisfied if the corroborative testimony tends only to establish the credibility of the accomplice. The corroborative evidence, to have any value, must be evidence from an independent source of some material facts tending to show that the defendant was implicated 4041
in the crime. The independent evidence must be material evidence other than that of the accomplice, and must fairly and reasonably tend to connect the defendant with the commission of the crime. It may not depend for its weight and probative value on the testimony of the accomplice. It need not alone and by itself establish that the defendant committed the crime; but where the corroborative evidence standing alone has no real tendency to connect the defendant with the commission of the crime, it is insufficient. Under the law of this State, the test of

4042 *Charge to the Jury*

the sufficiency of the evidence adduced in confirmance of an accomplice is that it shall tend in some degree to connect the defendant with the commission of the crime. Evidence which merely shows that the crime was committed in the fashion described by an accomplice is not such corroboration of his testimony as is required by the statute referred to.

Gentlemen of the jury, you will bear in mind that law of corroboration I have just charged
4043 and apply it in every appropriate instance.

Now, then, Yellin being in the eyes of the law an accomplice, it is therefore necessary for the prosecution to furnish the aforesaid required corroboration.

The People called the witness Sam Kovner to the stand, who testified that he, too, was a Sing Sing convict, serving a sentence of fifteen to thirty years for robbery; that he knows Beitler fifteen years, Rudish thirteen years, Malinsky eight years and Indovino since 1940. He testified that on or about February 10, 1941, he
4044 saw Indovino and Malinsky at Attorney and Broome Streets. He testified that he was in company of Beitler, and that Malinsky and Indovino came over to confer with Beitler. He testified that Indovino said that he had a "piece of work and wanted Beitler to go out on it"; that Beitler asked Indovino what the "piece of work was about", and Indovino replied that it was a "payroll in Coney Island, and that a cop goes with the payroll but he will give up if you put a pistol to his back".

Kovner then swore that he conferred privately with Beitler and then rejoined Malinsky

and Indovino. He testified that Beitler then told Malinsky and Indovino that he, Kovner, refused to go along because there was a cop involved; that Beitler asked Indovino, "Are you going along?" and Indovino replied that he cannot go because he is known there in Coney Island; that Beitler then made an appointment with Indovino and Malinsky to see them at a later time, and said that he would try to get a third man to go with them.

Kovner then testified that on or about February 21st or 22nd, while in the company of Beitler, on Attorney Street near Broome Street, Indovino came along and told Beitler that he needed money; that Beitler then made an appointment for two days later to meet Indovino at a bar and grill at Houston and Allen Streets; that they did meet there at this bar and grill and in the presence of Kovner Indovino said to Beitler, "You are too fast. You got too hot. You did not have to shoot him. All you had to do was to put the gun up against his back. What did you shoot him for?" referring to the policeman in Coney Island. Beitler is said to have replied, "I am on the lam. I am hot, and I won't stand for a cop identifying me." 4046 4047

Kovner testified further that on February 27th or 28th, while in the company of Beitler, he saw Indovino, and on that day Indovino said to Beitler, "I heard you made a score, and I need money." The witness explained that "a score" means a holdup.

Gentlemen of the jury, I charge you that there is no evidence in this case that Samuel Kovner is an accomplice, and that you may consider his

testimony and determine whether or not he has corroborated the testimony of Yellin, who is in law deemed an accomplice. I charge you that Yellin is in law an accomplice. I charge you that Kovner is not either in law or in fact an accomplice.

It may be proper at this point to elaborate somewhat on the reasons for declaring Yellin to be an accomplice as a matter of law, and for the holding by the Court that neither in law nor
4049 in fact is Kovner to be deemed an accomplice. You will note that according to the witness Yellin's own testimony on direct examination he was fully familiar with the details of the proposed criminal enterprise, and he performed services while in possession of that knowledge, in carrying along this criminal enterprise. That occurred when he carried the message to Spielfogel under the direction of Abraham Beitler given in the presence of Joseph Indovino. It is quite true that his mission to Spielfogel, according to his testimony, was unavailing, because Spielfogel, it is alleged, refused to become a
4050 party to this plan to rob the theater manager. But that does not under any circumstances relieve him from the responsibility of being an accomplice of Beitler and Indovino. The test as to whether one is an accomplice is not determined by success or failure of the mission. Yellin had a definite job to do. It is quite true that the part he played was indeed a minor one, namely, that of messenger boy; but nevertheless when he carried out this small part, with criminal knowledge, he is in the eyes of the law an accomplice.

Kovner stands on a different plane. Kovner, too, says that he was present when Indovino

proposed this plan; but one does not become an accomplice by merely being present. One does not become an accomplice by even mere approval of a crime before it is committed. One does not become an accomplice by being a mere passive witness at the time the crime is planned. Enough must be shown to justify the inference that the individual has counseled or induced or encouraged this crime in order to render him an accomplice. There is no evidence that Kovner did anything in connection with this alleged plan to rob; the evidence being quite to the contrary, that he refused to have anything to do with it. The mere fact that he knew about the plan, standing alone, does not make him an accomplice. 4052

Yellin's and Kovner's testimony concerning Indovino, which referred to the transactions prior to February 15th, are concerned solely with the proposal by Indovino of the plan to rob the Coney Island theater manager, who would be accompanied by a policeman.

Even assuming that you believe the testimony of Yellin and that his testimony is corroborated by Kovner—in other words, that you are satisfied beyond a reasonable doubt from the testimony of these witnesses that Indovino did in fact propose this plan—you are then met with another problem which must be resolved in favor of the prosecution in order to warrant the conviction of Indovino at your hands. 4053

Assuming that you find beyond a reasonable doubt that Indovino did make this illicit proposal, and assuming further that you are convinced beyond a reasonable doubt that the policeman was shot and killed during the com-

mission of a felony, you must determine whether or not the People have shown beyond a reasonable doubt, as against Indovino, that the killing was perpetrated by one or more of Indovino's accomplices. The only proof bearing on that point which is submitted to you by the prosecution, and on which the prosecution must stand or fall, lies in the testimony of Kovner concerning the conference said to have occurred between Beitler and Indovino on February 21st or 22nd,
4055 on Attorney and Broome Streets, wherein it is alleged by Kovner that Indovino rebuked Beitler and said to him, "You are too fast. You got too hot. You did not have to shoot him. All you had to do was to put a gun up against his back. What did you shoot him for?" referring to the cop in Coney Island; and Beitler's reply, "I am on the lam. I am hot and I won't stand for a copy identifying me."

If you disbelieve this testimony or you have a reasonable doubt as to whether Indovino made such a statement, you must acquit this defendant. And even if you believe that such a state-
4056 ment was in fact made by Indovino to Beitler, you must then determine therefrom, whether the State has proven beyond a reasonable doubt that Beitler was an accomplice in the actual perpetration of the robbery or attempted robbery of the theater manager in Coney Island, during which the policeman was killed.

You jurors must always remember that the life and liberty of the accused on trial must not be carelessly and capriciously destroyed. A verdict of guilty, with all that it portends for a defendant, must be grounded on good, solid, substantial proof, not mere suspicion, no matter how

strong that suspicion may be, and not on mere surmise or innuendo. Proof is required that inexorably points to legal culpability, proof that establishes guilt beyond a reasonable doubt.

Of course, gentlemen of the jury, you must consider the testimony offered in behalf of Indovino both by him and by his witnesses. Indovino took the witness-stand and testified in his own behalf. He, too, is an ex-convict, having been heretofore convicted of the crime of attempted robbery and having served a term in Elmira Re- 4058
formatory. He swore that for a long period of time, encompassing a portion of 1940 and all of 1941, he was accustomed to have his evening meal at the home of his then sweetheart and later wife, on Ocean Parkway, in the Avenue U section of Brooklyn. He testified that this custom was never varied, and, if his testimony is to be believed, every evening was spent in company of the lady in question.

These meetings alleged to have taken place with these criminals in Manhattan are said to have occurred in the late afternoon and evening. Therefore, if Indovino was at his lady friend's 4059
house on Ocean Parkway at the time, he could not, perforce, be present at these alleged conferences over in Manhattan. Thus he has sought to interpose what is commonly known as the defense of alibi, and he has called in corroboration thereof his mother-in-law, as well as his then sweetheart and now wife. An alibi defense is the best defense known to law where it is true; because no man is uniquitous, no man can be in two places at the same time. Therefore, an alibi, if true, clearly exonerates the accused. The defendant is under no duty to prove his alibi

4060 beyond a reasonable doubt. An alibi defense is sufficient to entitle a defendant to an acquittal if in the judgment of the jury it creates a reasonable doubt as to his guilt.

Indovino claims that he does not know Beitler, does not know Rudish, does not know Yellin, does not know Kovner and he does not know Spielfogel.

You will, therefore, consider the testimony adduced on behalf of the People solely as against
4061 Indovino, and the testimony adduced in behalf of Indovino, and determine from all of the evidence in the case, as it applies to this defendant and to him alone, whether or not his guilt has or has not been established to your satisfaction beyond a reasonable doubt. If it has not, acquit him. That would be your duty. And if it has, convict him. That would be your duty.

Now as to the defendant Rudish.

The evidence offered by the prosecution in an attempt to implicate Rudish comes from two sources, namely, Spielfogel and Yellin. Spielfogel's testimony concerns the events prior and
4062 subsequent to the alleged killing of Fox, and Yellin's testimony refers to the events subsequent to the killing of Fox.

Let us, therefore, first consider the testimony of Spielfogel. Spielfogel swore that he is now doing a thirty to sixty year term for armed robbery, where Yellin was his co-defendant. He also testified that in 1937 he was convicted of attempted robbery and sentenced to Elmira, where he served three years. He testified that he knows Malinsky six years, Rudish fifteen years and Indovino since 1937. He testified that on Friday the 14th of February (keep these

dates in mind, please) he was standing near the candy store at 7th Street and Avenue D. He said that Rudish came along and stated, "How come you are working? What's the matter with that thing? How come you ain't going on it?" Quoting Spielfogel, "I says to him, 'I don't like it, Jake, that is all.'" He then testified that he again saw Rudish on Saturday afternoon at the same place, and Rudish again said, "How come you ain't going on this thing? It is supposed to be a good thing." Spielfogel then replied, 4064
"I will tell you the truth, Jake. I don't like the tipster." Rudish then said, "Malinsky and Beitler are going to step out on it tonight and I got to meet them at nine p.m." Spielfogel then related an alleged conversation concerning his uncle named Sonnenblick. Sonnenblick, it is said, resided somewhere in Brooklyn in the East New York section. He testified that Rudish said to him that he wanted to have Sonnenblick act as the employer of a man who was out on parole, so that if the parole officer visited Sonnenblick, Sonnenblick would say to the parole officer that the parolee was on his payroll and 4065
was receiving fifteen dollars a week; and Rudish asked Spielfogel, the nephew of Sonnenblick, for his, Spielfogel's, "O.K." with his uncle, so that this arrangement could be made. Rudish said that he would visit the uncle, but that he had to get back by nine o'clock at night in order to meet Malinsky and Beitler, who were "going to step out on the job tonight."

Now, in point of sequence, the narration then turns to David Yellin, who testified that on Saturday night, between midnight and one a. m. Sunday morning, Yellin was playing cards in this

East Side candy store when Rudish came along and motioned for him to come outside. He testified that Rudish was excited and told how he had just come back from a "job in Coney Island and that Beitler and Malinsky had just shot a cop"; that he, Rudish, "had a narrow escape, that he had a tough time getting away; that the car was an old shillalah; that it went a couple of blocks and then the damned thing would not go, so they stopped it", and Rudish, after leaving the car wound up on the "L" station. He inquired of Yellin if his, Rudish's wife, had been around that night, and Yellin replied that he had not seen her. Rudish then said, slapping the pockets of his lumberjack, "I have got to meet Beitler and duck the pieces", meaning to hide the guns. He then asked Yellin if he needed any money, and then took out some money and said, "I have got over two bills here" (meaning more than $200) "for my end." Yellin replied that he did not need any of the money.

You will bear in mind, as I have instructed you, that Yellin is an accomplice as a matter of law, and must be corroborated in the manner indicated by the statute to which your attention has been directed. Spielfogel, on the other hand, is not as matter of law an accomplice, and the question as to his status as an accomplice is left for the jury to determine.

Spielfogel, it is contended by the State (with what force and effect it is for you to say) cannot under any circumstances be deemed an accomplice; for he at all times, it is claimed by the State refused to participate in the scheme to, or

in the perpetration of the commission of the Coney Island robbery.

There was some testimony offered, I believe, on the cross-examination by one of the counsel, that he had handled the guns which were later allegedly used in the Coney Island robbery. He steadfastly denied that he supplied the guns to Beitler when requested by Beitler, and swore from the witness-stand that he told Beitler that the guns were not his but were Malinsky's, and that he had no control over the same. 4070

You will therefore consider all of the evidence in the case that throws any light upon Spielfogel's connection with the entire transaction or with any of its aspects, and determine for yourselves whether or not Spielfogel is an accomplice in this case; bearing in mind the definition which I have given you, and recalling that a mere passive asquiescence in the commission of a crime, without more being shown, is insufficient to render one an accomplice. Here it is contended by the State that not only was Spielfogel not actively associated with Beitler and the others in the commission of the Coney Island crime, but had steadfastly refused to have any part in it. 4071

On the other hand the defendant Rudish vigorously contends that he, Spielfogel, is an accomplice. If you find that Spielfogel is an accomplice, then his testimony cannot be used by way of corroboration of Yellin, and the defendant must be acquitted. On the other hand, if you find that Spielfogel is not an accomplice, then you will consider his testimony, either alone, or as corroborative of the testimony of Yellin, and deter-

4072 mine therefrom the guilt or innocence of the defendant Rudish.

Spielfogel further testified that after Rudish had talked about Uncle Louis Sonenblick and his appointment with Malinsky and Beitler to "step out on the job", he later saw Rudish on Sunday, the day after Fox was allegedly shot, and Rudish said to him; "Last night everything was fixed to do it one way, and he" (meaning Malinsky) "balled everything up." Speaking of Sonenblick,

4073 Rudish said that he had tried to reach Slip Spielfogel by phone while he was out in Brooklyn on his way to see Sonenblick, because he had forgotten Sonenblick's address, which was on some memorandum in some other clothes which he left at his home in Manhattan, and was unable to contact Spielfogel by phone; that it was close to nine o'clock when he was out in Brooklyn, and, because he had to get back to the city in a hurry, he took the first car he saw and drove it to New York and picked up Malinsky on Eighth Street and then Beitler on Houston Street, and then they

4074 drove out to Coney Island.

Rudish then related, according to Spielfogel, that after the "hoist" "which in underworld language means "robbery"), and after he left the holdup car, he went up on the Stillwell Avenue station; that there he heard the sirens blowing, and between the sirens and the "fireworks" (referring to the shooting) he said he was going insane waiting for the "El" train to come along. Rudish then allegedly told him he went on to New York and then to the Citadel Club, bringing with him an extra pair of license plates "to put on the hot ones", as it is testified by Spielfogel.

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As to the money stolen, he said there was not much money there. He said they got about $220 a piece, and Malinsky got $20 extra because his "pieces" were used.

Now, with reference to the case of Rudish, gentlemen,

1. Are you satisfied beyond a reasonable doubt that Fox was killed during the commission of a holdup or an attempted holdup in Coney Island; and

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2. In addition thereto are you satisfied beyond a reasonable doubt that the defendant Rudish was implicated in that holdup, and, therefore, under the law, in the killing of Patrolman Fox?

You will recall my instructions that the mere fact that it is not claimed that Rudish fired the lethal shot or shots does not absolve him from guilt of murder in the first degree, if it has been established beyond a reasonable doubt that he aided and abetted in the commission of the robbery or attempted robbery in any manner; for example, if he aided by driving the alleged thugs to the scene and then driving them away, or if he aided in any other manner.

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At this point in order of sequence it may be apropos to consider the testimony of the witness Private August Hollingsworth, who testified that he is the owner of this alleged holdup car; that on February 15, 1941, at or about nine p.m., he left his car on Pine and Fulton Streets in Brooklyn, about a mile from the home of Uncle Sonenblick. The ignition was locked. He returned to

4078 get his car about one a.m. and found that it was gone. He telephoned the police, and saw his car again in front of the Coney Island police station at about four a.m. He found that the ignition wires had been crossed; that there was a hole in the fender and also one in the hood, which were not there when he left his automobile on the street in East New York earlier that evening. He stated that the right rear door had not been in good working condition for some
4079 time, and that the automobile when he saw it recently was still in the same condition.

According to the witness Spielfogel, Rudish confessed to him that he had stolen an automobile in the vicinity of Sonenblick's neighborhood, and that with that stolen automobile he returned to New York, picked up his companions, then drove out to the scene of the crime, and thereafter escaped in this automobile and abandoned it a short distance away, in the vicinity of the Stillwell Avenue "El" station.

Great stress has been laid by counsel upon the
4080 fact that the prosecution has failed to produce any witness who saw either of these defendants on trial at the scene of the occurrence where Fox was allegedly shot. I believe that I have already instructed you that the mere failure to produce identifying withnesses does not in and of itself necessarily entitle the defendants to an acquittal as a matter of law. Now, concerning that point as it affects the case of Rudish, I call to your attention the fact that in lieu of an identifying witness the prosecution has offered for your consideration what is known in law as a confession, alleged to have been made by the

defendant Rudish to Spielfogel. It is claimed by the prosecution (of course, with what force and effect it is for you to say) that in this confession, so made as alleged to Spielfogel, Rudish implicated himself in the commission of this alleged crime to such an extent that all of the elements required under the law have been established beyond a reasonable doubt, and that therefore the defendant should be convicted of murder in the first degree.

The Court will read for your guidance the 4082
statute governing confessions.

"A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor; but it is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

You will note from my reading of this statute that a confession of a defendant may be made to 4083
a private person; that it does not necessarily have to be made to a public official; that it need not take the form of a writing or a statement or an affidavit, or be made in the presence of a District Attorney's stenographer. Here it is contended that this defendant Rudish confessed to his friend and acquaintance Slip Spielfogel.

The law, however, provides that there must be additional proof that the crime charged has been committed. Do not be misled by what I have just said. The additional proof required is not proof implicating the defendant in the crime.

4084 *Charge to the Jury*

There must be merely additional proof to show that the crime was committed. For example, if a man should walk into the station house and say to the lieutenant behind the desk, "I have just killed John Jones", that man cannot be convicted, although he has made a confession. There must be independent proof showing that a man by the name of John Jones was actually killed—not that the one making the confession killed him, but that John Jones was actually killed.

4085 The additional proof, it is claimed in this case, comes from the Coney Island witnesses, Mr. Dolinsky and the others, that a robbery was in progress and that the policeman was killed during the commission of that crime. That is the independent proof referred to; that is the additional proof referred to.

Rudish denies that he made this confession or any other confession to Spielfogel, or to any other person. Of course, if that be true, then the defendant Rudish must be acquitted. He is also entitled to an acquittal if you should have

4086 a reasonable doubt as to whether he made this alleged confession to Spielfogel. On the other hand, if you do believe beyond a reasonable doubt, that he did make this alleged confession to Spielfogel, and, furthermore, that the confession that he made is true; then you may consider whether or not the defendant's guilt has been established of the crime of murder in the first degree.

Of course, gentlemen of the jury, you must consider the testimony offered by the defendant Rudish, in determining his guilt or innocence.

Rudish steadfastly denied from the witness-stand that he had any part in the commission of this alleged crime. He vigorously protested his innocence, and each and every bit of evidence offered by him or in his behalf must be taken into consideration by you, as well as all of the evidence offered by the prosecution against him, in determining whether his guilt has been established beyond a reasonable doubt.

Much has been said by all counsel for the defendants about the depraved and criminal 4088
character of the convict witnesses who testified here in behalf of the prosecution: Yellin, Spielfogel and Kovner. While it is appropriate to say that truth does not come voluntarily from sources so polluted, yet we must accept conditions as they exist.

"Criminals may tell the truth. If, after weighing the stories, in view of all the circumstances and all corroboration, it seems credible, we need not reject it merely because their reputation is bad or their habits vicious. Such facts are but a warning that caution should be used. For it 4089
is also to be remembered that in fixing blame for such a crime as we are here considering, the State is not likely to discover witnesses of high character." Gentlemen of the jury, these are not my words that I have just read to you; these are the words of an illustrious and distinguished Judge of our Court of Appeals who has gone to his reward. So spoke Judge Andrews, of our Court of Appeals, in the famous case of People vs. Cohen.

We now come, gentlemen, to the consideration of the case of Morris Malinsky.

In point of sequence, we have the testimony of

4090 Samuel Kovner. You will recall that Kovner swore that on February 10, 1941, he in company of Beitler spoke with Indovino and Malinsky on Attorney and Broome Streets. It was then, according to Kovner, that Indovino proposed the holdup and elaborated upon the details thereof. Kovner swears that Malinsky was present at that conference; that Indovino said that he could not partake in the robbery because he was well known in Coney Island; that Beitler invited Kovner to
4091 go along and that Kovner refused because, as he put it, a cop was involved. Beitler then said in the presence of Indovino and Malinsky that he, Beitler, was going to attempt to get a third man. Malinsky from the witness stand, denied that any such conversation or conference ever occurred. It is therefore incumbent upon you to say whether Kovner told the truth. If you find beyond a reasonable doubt that he did, then that places Malinsky into an association with Beitler and Indovino at the very inception of the plan to hold up the theater manager.

4092 Next in point of sequence is the testimony of the witness Peter Shamin. You will recall that Shamin testified that on February 15th, on Saturday, he was employed in the store on First Avenue in which Malinsky also worked; that Malinsky came to him and said, "Pete, go and get the bag of 'pieces' in the hall—they are between the napkin boxes—and put the bag in the toilet." He testified this occurred about 4 p.m. on this Saturday. At one point, you will recall, he testified that this transaction took place in the month of January, and he was later recalled to the stand by the district attorney to

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withdraw the date so mentioned and to insist that the affair actually took place on February the 15th. Unless you find beyond a reasonable doubt that this actually did occur, if it did, on February the 15th, and not on any other day; then you will disregard his entire testimony and not permit it to play any part in your deliberations upon the guilt or innocence of Malinsky.

Bear in mind, gentlemen of the jury, that this testimony was not received by the Court for the purpose of showing that Malinsky was in the habit of possessing lethal weapons, or to show that he was a criminal or a person of depraved character. The importance of this testimony, if it be important at all (and that is for you to say), rests in its possible bearing upon the testimony of Yellin, who swore that on that very Saturday night at or about 8 p.m. he saw Malinsky near a candy store at No. 376 East Eighth Street, and that at that time Malinsky was carrying a package under his arm, wrapped up in brown paper, and that package was about ten inches square.

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Shamin testified that when he handled a package in the store earlier that afternoon, at the request of Malinsky, he felt the butt end of a gun inside that heavy package.

It is contended by the prosecution that it may reasonably be inferred that the package which Yellin allegedly saw under the arm of Malinsky at 8 p.m. is the same package referred to by Shamin.

We next pick up the alleged events in the case of Malinsky, as claimed by the prosecution, in the testimony of Spielfogel. Spielfogel testified

that about 1:30 o'clock on Sunday, February 16th, Malinsky came to his home at 392 Lewis Street, rapped at the door, and when the door was opened he said to Slip, "We had a shooting match. I want to talk to you." Slip said, "Wait a minute; take it easy, Moish", and then slipped out into the hallway with Malinsky. Malinsky then said, "We had a shooting match. Get dressed. I have got to talk to you." Slip got dressed and went downstairs with Malinsky in front of Slip's house,
4097 where Slip noticed that Malinsky was dressed in a brown suit, he had no overcoat and he had no hat, his hair was disheveled. Slip asked, "What happened to your hat and coat?" Malinsky replied, "I dropped the coat over at the club, but the hat—it is Hershie's hat—I dropped it on the hoist after I jumped out of the car." Malinsky, according to Slip, said that it was Hershie Levine that made a present of this hat to him.

Mr. McGough brought here Levine's sister to the stand, in an attempt to account for his inability to bring Hershie, himself, here. The sis-
4098 ter testified that she heard from her brother recently, and that he was in the Army in England.

Slip, when informed about the loss of the hat, returned to his own apartment and brought down a green hat for Malinsky to wear. Then they started for the Citadel Club, located on Fourth Street and Avenue C. On the way Malinsky said: "The cop went down. The donkey went down like a ton of bricks. It's a sure thing he will never make it. Valentine will pay off one of them brand new C notes by morning."

They arrived at the club. There Malinsky related to Slip what had happened. He said that

he met Rudish at 9 o'clock, then they picked up Beitler, and then went out to Coney Island. On the way it was arranged "who was to take the cop, and who was to take the paymaster." Then they drove to the Cosmo Restaurant, where they enjoyed a little snack. Beitler stepped out by the theater, returned to the restaurant, and then told Rudish to drive the car to the vicinity of the bank, and "When I give the signal for Moish to be ready, that means the cop is coming down with the paymaster." Shortly thereafter the cop 4100
and "payman" passed Beitler. He gave the signal to Moish and Moish stepped out of the car. Moish hollered, "This is a hoist. The cop went for his piece so I threw a few, I pegged a few."

Moish was supposed to go for the money, but failed to do so, and Beitler called out to the payman, "Stop where you are or I will drop you." Malinsky jumped to the car, but the door was broken, so he got in through the front and climbed over the seat into the back. Beitler then jumped aboard and they left. Slip then quotes Malinsky as saying: "That cop, that 4101
donkey, had a lot of balls. He laid on his belly and was still pegging. He was still throwing pills. He was still pegging."

Malinsky then told Slip that they went a short distance and then abandoned the car; that Beitler and Malinsky took a taxicab, rode a while and then changed to another cab and made their way to the East Side; that they stopped on Fourth Street and Beitler instructed Malinsky to go to his aunt's store on Houston Street and "drop the pieces". Rudish was coming back to

Manhattan by train, and later they all met at the club and there split up the loot.

Slip testified that he asked Malinsky, "What pieces did you use on that hoist?" And that Malinsky replied, "I used the pieces that Red Tiplet got out of the locker uptown. We used two .38 side-throwers and two .45 automatics." He said that he had the .38's and Beilter the .45's.

Now, gentlemen, it is for you to say whether
4103 or not Malinsky made this confession to Spielfogel. If you find beyond a reasonable doubt that he did, and in addition thereto you find that the salient elements of this confession are in fact true, then you may consider this confession in determining the guilt or innocence of this defendant of the crime of murder in the first degree. Did he tell Spielfogel shortly after midnight that he was out there in Coney Island engaged in the perpetration of this alleged robbery during which this policeman was allegedly shot? Was he presented with a hat by a man
4104 by the name of Hershie Levine? Did he wear that very hat on the night in question? Did he drop the hat as he fled from the holdup car? Did he tell that to Spielfogel? Was this brown hat marked in evidence found under the alleged holdup car near the scene of the shooting of Patrolman Fox? Was this Brown hat marked in evidence by the People worn by Malinsky on that Saturday night? Was this brown hat found underneath that holdup car there in that vicinity where this policeman is alleged to have been shot and killed? If you find beyond a reasonable doubt that it was, then it is for you to consider

whether or not that evidence ties Malinsky to the scene of the occurrence and tends to fasten guilt upon him in view of all the other facts and circumstances in the case.

At this point it might be well to refer to the testimony of the witness Eisler, known as Red Tiplet. You will recall that Spielfogel said that Malinsky told him that the guns used in the holdup were those recovered by Red Tiplet from some depository in the neighborhood of Grand Central. Tiplet took the stand and testified for 4106
the prosecution. He testified that he had never been convicted of crime; that he knows Rudish fifteen years, Malinsky three and Beitler several years, having gone to school with the latter, although he had not any commerce with him for a long period of time. He testified that in the latter part of December of 1940, Malinsky gave him a stub and told him to pick up a package in the terminal and bring it down to the Citadel Club. He testified that he went uptown to the vicinity of 42nd Street, paid four dollars to the subway stand keeper, which Malinsky had given 4107
him, and got the package and brought it down to the Citadel Club. He testified that Malinsky opened the package and then Red Tiplet says that he saw four pistols, two fountain pen guns and two .38s. These were wrapped in stockings, and Malinsky withdrew them from the stockings; there were other stockings in the package; the package was examined in an upstairs room of the club with no one present other than Malinsky and the witness.

Let us pause here and consider now the answer of Malinsky to the evidence thus far given.

4108 He denied he was present at any conference at which a proposed holdup was discussed; he denied he was present on Eighth Street on Saturday night with a package under his arm; he denied he was ever presented with a fedora hat by one Hershie or Levine. He denied that he went to the home of Spielfogel on the early morning of February 16th. He denied that he had any conversation with Spielfogel concerning the Fox killing. He denied that at that time
4109 he went with Spielfogel to the Citadel Club and there confessed to his participation in the Fox killing. He denied he ever told Spielfogel that the guns used in the Fox killing were those which Red Tiplet had recovered from a checking compartment in the midsection of New York. He denied he ever had such guns in a checking compartment or that he ever had Tiplet recover the same for him.

In sum, he swears that all of this testimony is untrue; that it is fabricated; that it is the result of a vicious and cowardly frameup on the part of these Sing Sing convicts and/or others.
4110 He assigns as a motive to falsify on the part of Spielfogel the fact that he had a dispute with Spielfogel about an alleged intimacy between him and Spielfogel's wife. He alleges that Spielfogel is angry because after Spielfogel was sent to prison in 1941, he, Malinsky, had made some contributions to the support of Spielfogel's wife, and that thereafter these contributions were stopped; that Spielfogel's wife importuned him to continue these contributions, and that because of his refusal so to do, and for other reasons, Spielfogel bears a hatred and a grudge

toward him. He claims (of course with what force and effect it is for you to determine) that Spielfogel had a hand in this alleged nefarious crime, and that Spielfogel, in order to save himself from being implicated, has seized upon Malinsky as a victim. He alleges that Spielfogel has an "axe to grind", so to speak; that by giving his aid to the State, he expects to help himself. This he says about the other convict witnesses as well, that by giving their aid to the State they will help themselves to cut 4112
down somehow the long sentences they are now serving in State's prison.

Now, gentlemen of the jury, who is telling the truth here? That is for you to determine. I have tried to present thus far the respective contentions of the prosecution and the defense.

Now to continue with the sequence of the alleged events as related by the People's witnesses, we again turn to Spielfogel's testimony. According to him they are now at the Citadel Club. It is in the early hours of the morning. They leave the club and from there go to the 4113
Melrose Restaurant. They tarry there for a few moments and then Slip and Malinsky go to the store on Tenth Street where Malinsky left the silver coins that were taken in the holdup. From there, Slip says that Malinsky and he went to Malinsky's sister's house on Tenth Street. Malinsky said he wanted to "stake her", because he did not want to go home because the parole officer might be around, and he wanted his sister to induce his brother-in-law, Di Pisa, to permit him to stay at their home for the night. They went up to an apartment on the third floor, and

Malinsky then spoke to his sister while Slip was nearby. Slip testified that while he was in the hallway he heard Malinsky say to somebody, "Get back to bed".

In order to substantiate and corroborate this part of Spielfogel's testimony, the district attorney placed on the witness-stand one Virginia Goonan, referred to here as Jean, and a man by the name of Di Pisa.

Virginia Goonan testified that on the night of
4115 February 15th she was living at the home of the Di Pisas; that Mr. Di Pisa was married to Shirley, who was the sister of the defendant Malinsky; that at about 2:30 or 3 o'clock Sunday morning there was a banging on the door. She awoke. Shirley went to the door, and the witness went into the kitchen. Malinsky was there, and he asked Shirley if she could put him up there for the night. She replied that there was no room. Malinsky then said, "We ju[illegible] shot a cop."

Di Pisa then got up and pushed Malinsky out
4116 into the hall and said he did not want him in the house, he did not want any trouble. Before being pushed into the hall, Malinsky had said, "We each got $200 a piece."

Virginia Goonan testified that when she got up from her bed and went into the kitchen and heard what Malinsky had said, that she said, "What did you do? Shoot a cop?" And Malinsky replied, "Get back in bed before I give you the same thing I gave the cop." This witness was cross-examined at great length concerning the date when this episode is alleged to have occurred. At one time she testified this happened in the month of January, and later she

was brought back and retracted this testimony and swore that this occurrence took place during the early hours of Sunday, February the 16th.

Gentlemen, in considering this witness's testimony, as with every other witness, you will pay strict heed not only to the direct examination but also to all matters developed by counsel on cross-examination, in determining the credibility and weight to be given to the witness. You will, therefore, determine in this case, whether or not what Jean Goonan said is true, and if true, does 4118
it corroborate the testimony of Spielfogel concerning the visit to his sister's home in the early hours of the morning of February 16th and what transpired there.

Di Pisa, the brother-in-law of Malinsky, was then called to the stand. You observed him. You had an opportunity to size him up. He testified that early Sunday morning, between 1:30 and 2:00 a.m. he was asleep in his apartment; that there came a loud knock on the door; that his wife got up and opened the door, and that Malinsky entered. He testified that Malinsky then said that he had shot a cop in Coney 4119
Island, and that he had $200 in his pocket. Di Pisa then testified that Jean (that is Virginia Goonan) came into the kitchen and Malinsky said to her, "If you don't get back to bed there, I will give you the same dose I gave the cop." Di Pisa then grabbed the door and told Malinsky to "get the hell out." Malinsky left, and Di Pisa said that he has not seen him since.

The defendant vigorously denies that he visited at his sister's home on the occasion mentioned and made the statements attributed to

4120 him. Therefore, you must determine whether or not the People's witnesses, namely, Spiefogel, Goonan and Di Pisa are telling the truth, or is the defendant telling the truth, or is there a reasonable doubt in your minds concerning this evidence. If you believe from all of the evidence adduced that Malinsky was not there as it is charged, and/or that he did not say the things attributed to him; or, if you have such reasonable doubt; then you will disregard the testimony
4121 of these witnesses for the People. On the other hand, if you believe beyond a reasonable doubt that he was in fact there, as it is claimed, and that he did make the statement to the effect that he had shot a cop, or that "we had shot a cop" and spoke about the money that he had received, then you will consider this testimony together with all the other testimony affecting this defendant, in determining his guilt or innocence of the crime of murder in the first degree.

There is then a pause in the procession events, from the month of February, 1941, to the month
4122 of September or October, 1941.

In the meantime, gentlemen, Kovner, Spielfogel and Yellin had been sent away to State's Prison.

Testimony was developed on cross-examination of Spielfogel to the effect that while Spielfogel was in Sing Sing, he mentioned some of the details of the crime to a prisoner by the name of Lorrington, and that he had also exchanged some words with Kovner about this affair. In the early Fall of 1941, Spielfogel was brought down to the Bossert Hotel.

He testified that for several days he refused

to give any information to the authorities, but finally told the police what he alleges he heard about the details of the Fox case.

Malinsky was arrested on Friday, October 23rd, and brought by the detectives to a room in the Bossert Hotel. There, it is claimed by Spielfogel, he came face to face with Malinsky.

Spielfogel testified that Malinsky spoke to a lieutenant of police and asked permission to speak to Slip. Malinsky is reported to have said, "I know they have got Jake (meaning 4124
Rudish) in the other room. Otherwise they cannot know so much. They know too much already. I might as well go out and tell them the rest of it and get it over with." Slip replied, "Well, you are over 21. You know what the score is." Malinsky then said to the lieutenant, "I will tell you the truth, but I don't want to go to the chair for this." The lieutenant replied, "I cannot promise you anything. This is a police case. You will have to take your chances. Whatever happens, happens." Malinsky then said, "I would like to bring in a rabbi, or Nat Math." 4125
(Nat Math is an assistant district attorney.) "I would like to talk to him before I say anything." The lieutenant replied, "This is my case. You have to take your chances." Malinsky then told the lieutenant, as Spielfogel puts it, "everything."

Now, gentlemen, what is Malinsky's version? Malinsky claims he was arrested on Friday, the 23rd, and taken to the Hotel Bossert, where he demanded to be "booked" that afternoon. The detectives, he claims, refused. He also demanded to see a lawyer. This the detectives also refused.

4126 Malinsky alleges that he was told to strip and that then, after he had protested his innocence, the police beat him severely and threatened to throw him out of a six-story window, in order to extort a confession from him that he was implicated in the Fox killing. He claims that several of the detectives beat him with their fists, and struck him across his back and his head and his face and on other parts of his body. His version of the talk with Spielfogel is to the
4127 effect that Spielfogel called him into the clothes closet and told him, in words or substance, that if he wanted to save himself from a terrific beating, he had better tell the police what the police would like him to say; that he, Spielfogel, knew that he was innocent, and that under the circumstances this was the proper course to pursue. He then testified that, in order to save himself from the terrific beating, and with the aid of Spielfogel, who in Yiddish related to him the details of the crime, he finally made an oral confession to the police or to the district attorney
4128 late that evening or some time during the early morning of the following day.

The police on the other hand, including the lieutenant of detectives, McNally, Detective McNally, Detective Low and Detective Bell, deny emphatically that any force, either physical or mental, was visited upon Malinsky at any time from the moment of his arrest in Brownsville up until the time that he was taken before the Magistrate, on October 27th. Lieutenant McNally claims that he was willing to arraign Malinsky before a Magistrate on the very day, namely, Friday, when Malinsky was first brought

4129

to the Bossert, but that Malinsky stated that he would rather stay at the hotel with his friend Spielfogel than be thrown into a cell in a police station.

Be that as it may, I charge you that it was the duty of the police to arraign the defendant before the nearest Magistrate without unnecessary delay, and, further, that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor.

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But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinsky, including the one made in the early hours of October 27th at the Bath Beach station house.

4131

However, I am charging you that the failure to arraign, in and of itself, is not conclusive against the People, and does not in and of itself, standing alone, destroy the validity of the confession. Is that clear?

On the question whether Malinsky was coerced, you may consider that he made no complaint to the Magistrate when arraigned and did not seek the services of the jail physician. That evidence, if true, is not, however, conclusive against Malinsky, but may be considered by the

4132

jury on the issue of the voluntariness of the confession.

Detective Celano testified that on October 26th, he, together with other detectives and Malinsky and Spielfogel, entered an automobile near the Bossert and then the chauffeur, directed by Malinsky, drove the car through Prospect Park and along Ocean Parkway to Surf Avenue in Coney Island, and then to the Cosmo Restaurant, where Malinsky told them that he and his companions
4133 had tarried on the night of February 15th, when Fox was shot. He then, according to Detective Celano, directed the officers to the scene where the shooting occurred, and there pointed out the several points of importance in connection with the events of that evening.

Malinsky's reply to this evidence is that he did not direct the chauffeur how to proceed; that they did not drive out along Ocean Parkway but, on the contrary, that they went along the highway skirting the waterfront, and in that manner was taken to the Cosmo Restaurant; that
4134 Spielfogel, speaking to him in Yiddish, pointed out to him the Cosmo Restaurant and related to him more of the details of the holdup and the killing.

Malinsky claims that all of the information that he gave to the police or district attorney was the result of the instructions that he had received from Spielfogel; and that none of this information came out of the reservoir of his own knowledge or experience.

There again, gentlemen of the jury, you have a sharply contested question of fact. Are Spielfogel and the police officers telling the truth, or,

on the other hand, is Malinsky's version the correct one? That, of course, is a matter left entirely to you for your decision.

Continuing, Celano then testified that he took Malinsky to the garage of the property clerk of the police department, where this alleged holdup car was in storage. He testified that there were about 150 automobiles in this garage, and, upon entering, he told Malinsky to point out the car that was used on the night of the holdup. Malinsky, he said, then carefully looked around 4136
the garage and finally pointed to the Ford with the cloth top. He then said to Celano, in words or substance, according to Celano's testimony, that the door had been difficult to open and that he would try the door to this Ford car and make doubly sure that this is the automobile that was used that night. The detective testified that Malinsky tried the door and found it to be as he stated, and he then positively identified the car, without any help or suggestion from the police or any other person.

Malinsky's version is that he had been shown 4137
a picture of this car before he went to the garage; that Spielfogel accompanied them and that Spielfogel pointed out the automobile to Malinsky. It is urged in behalf of Malinsky that he refused to touch the handle of the car, and told the detective he did not want his fingerprints to be recorded thereon, but that the detective commanded him to open the door, nevertheless. This, Detective Celano emphatically denies.

Now, gentlemen, it is for you to decide who is telling the truth in the case. When you shall have determined who of the witnesses who tes-

tified for and against each defendant have told the truth, you shall have gone a long way in determining the guilt or innocence of each of the defendants on trial.

Mr. Maguire, a stenographer in the District Attorney's office, then took the witness-stand, and through him the confession alleged to have been made by Malinsky was introduced in evidence.

Gentlemen, you have heard this confession read by Assistant District Attorney McGough. It has been marked as an exhibit in this case. It is needless for me to rehearse the matter contained in the confession. It must be fresh in your minds. Although Malinsky does not deny that he made this confession, his contentions are:

That the confession is valueless as evidence against him because it was made by him due to force and intimidation and fear visited upon him by the police authorities, and implied coercion because of the manner in which they kept him in custody from the time of his apprehension until he made this confession. You must find beyond a reasonable doubt that this confession was a voluntary one before you would have the right to consider it.

Malinsky then urges a second objection to this confession. His claim is that the statements contained in this confession implicating him in this crime are untrue.

Under the law, therefore, you will determine, first whether or not this confession is voluntary. If you find it was involuntarily made, or if you have a reasonable doubt about it, then you will

4141

disregard the confession entirely. On the other hand, if you find beyond a reasonable doubt that the confession is a voluntary one, you will then determine whether or not the statements inculpating the defendant, therein contained, are true. If you shall have resolved both of these questions in favor of the prosecution, then and only then will you consider the confession in determining the guilt or innocence of the defendant of the crime of murder in the first degree.

4142

Malinsky took the witness-stand and steadfastly denied that he at any time had any part in the commission of this crime. He denies the implicating statements attributed to him by the various People's witnesses. He denies that he was with Rudish on this occasion, and offers testimony to the effect that he did not even know Rudish until some time in the month of April, 1941, at which time, in a candy store on Seventh Street he was introduced to Rudish by Yellin while Rudish was in the company of a man by the name of Jalkover.

4143

Jalkover took the witness-stand and at first confirmed Rudish, and therefore Malinsky, that Yellin introduced them to each other in April of 1941, which was after the Fox killing had occurred. Thereafter, Jalkover was recalled to the witness-stand for further cross-examination by the district attorney, who developed that the introduction of Rudish to Malinsky took place not in April of 1941 but in the Fall of 1940.

You will recall the tesumony of Yellin to the effect that he introduced Rudish to Malinsky in October of 1940.

4144 *Charge to the Jury*

Gentlemen of the jury, I believe that I have touched on all of the highlights of the evidence concerning Malinsky, offered both in behalf of the prosecution and in behalf of the defendant. Has his guilt been proven by credible evidence beyond a reasonable doubt? That is a question you and you alone can answer.

I said to you at the beginning of these instructions that I would elaborate upon the meaning of the phrase "reasonable doubt".

4145 What is a reasonable doubt? A reasonable doubt is such a doubt as reasonable men may entertain after a careful and conscientious review of all of the facts in the case. It is a doubt founded in reason, and it arises from the evidence or from the lack of evidence, and for which, if asked for a reason for his doubt a juror can give, if he will, give a reason for entertaining it.

If in this case you entertain such a doubt as that, that reasonable doubt, under the law, is the property of the defendant, and he is entitled to an acquittal. A reasonable doubt is not a

4146 whim, a guess or a surmise that "maybe the defendant is not guilty"; nor is it a subterfuge to be adopted by a timid, vacillating juror as a cover for the purpose of avoiding the doing of a disagreeable duty.

Proof of a defendant's guilt beyond a reasonable doubt does not mean proof of guilt beyond all possible doubt or to a mathematical certainty. As men of experience in business affairs, you must understand that it is difficult, if at all possible, to prove anything human beyond all possible doubt, because all things human are open to some degree of doubt.

There is no provision of law which holds that a district attorney must prove a defendant guilty beyond all possible doubt. He is required to establish a defendant's guilt beyond a reasonable doubt. He is held to strict accountability, both by the letter and the spirit of the law, to establish a defendant's guilt beyond a reasonable doubt, but not beyond all possible doubt. That is the law of the State of New York. That law applies to this case.

There is one other provision of law to which 4148
your attention should be directed. If you should find a defendant guilty of murder in the first degree as charged in this indictment, you will bear in mind the provisions of section 1045a of the Penal Law. This statute reads as follows:

"A jury finding a person guilty of murder in the first degree, as defined by subdivision 2 of section 1044" (that is the section referring to felony murder) "may as a part of its verdict recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation the Court may sentence the 4149
defendant to imprisonment for the term of his natural life."

The provisions of the section that I have just read require that the jury must determine two matters: First, whether a defendant is guilty of the crime charged; and, second, whether the sentence shall be death or whether this Court may pronounce a sentence of life imprisonment. Both questions must be determined by the jury, and the jury's answer to both questions must be embodied in its verdict. Each juror should know

4150 *Charge to the Jury*

that the finding of guilt does not carry the mandatory penalty of death unless the jury fails to make a recommendation of life imprisonment a part of its verdict; and each juror should know that he is one of the twelve judges who shall decide what the verdict shall be in all of its parts. Until the twelve judges have agreed on every part of the verdict, they have not agreed on any verdict. In other words the jury must reach a unanimous verdict of guilt or innocence
4151 as to each defendant, and, in addition thereto, as part of the verdict, if the defendant should be found guilty, must reach a unanimous decision on the question of the recommendation to which I have made reference.

In conclusion, gentlemen, may I remind you of what I stated in my opening remarks in this charge. In the administration of our criminal law, a fair and impartial trial is a fundamental requirement. The People of this State have no spleen or revenge to satisfy. The State surrounds the accused with the constitutional safe-
4152 guards to which I have made reference, in order to afford them a fair and impartial trial. But the State also guards most zealously the rights, the property, the safety, the lives of its citizens from the attacks and encroachments of unruly members of society. And, while an innocent man must not be convicted, neither should a man be acquitted whose guilt has been established beyond a reasonable doubt. The obligation weighs with equal responsibility upon you to convict the guilty as it does to acquit the innocent; and therefore, whatever your verdict will be, it must be an intelligent verdict reflecting an intelligent solution of the issues presented during the trial,

and a scrupulous application of the law as charged by the Court. It must be a fair verdict, a just verdict, a verdict uninfluenced either by favor or by fear, by sympathy or by prejudice; a verdict that will satisfy your consciences and your oaths as jurors.

In this case you will render a separate verdict as to each defendant, and such verdict may be one of the following:

Not Guilty, or

Guilty as charged, or 4154

Guilty as charged with a recommendation of life imprisonment. A verdict of guilty not accompanied by a recommendation of life imprisonment will be deemed to indicate that the jury does not intend to make such a recommendation.

May I, for the sake of clarity, repeat? Your verdict as to each defendant may be one of the following:

Not Guilty, or

Guilty as charged, which will mean the infliction of the death penalty; or

Guilty as charged with a recommendation of life imprison nent. 4155

Your verdict does not have to be the same, under the law, for each defendant, either as to guilt or as to recommendation, or both. However, each defendant's guilt or innocence, and the recommendation if the verdict be guilty, must be decided individually.

Now, are there any exceptions or requests? Before taking the exceptions or requests, I am going to declare a short recess. (To the jury) You may retire a few moments. Do not discuss the case, gentlemen. The case has not yet been submitted to you for your consideration.

4156 *Requests to Charge and Exceptions*

AFTER RECESS. TRIAL RESUMED.

The Court: Now, then, I will hear the exceptions and requests.

Mr. Solovei: I respectfully except to that portion of your Honor's charge wherein your Honor demonstrated by some measures of glass or marks or reaching up to a certain level, as to liquid in a glass, et cetera—I did not get all of it—but whatever your Honor said about that I
4157 take an exception to. Also that portion of your Honor's charge wherein your Honor more particularly mentioned the names, Indovino, Rudish and Malinsky, and that they must follow the same procedure as to the measure and glass, et cetera, as to the question of reasonable doubt. I also respectfully except to that portion of your Honor's charge wherein your Honor spoke about the words of an illustrious judge who has gone to his reward, talking about the character of the witnesses. I also take exception to that portion of your Honor's charge wherein your Honor referred to reasonably inferring that the same
4158 package that Yellin saw wrapped in paper is the same package that Shamin saw on Saturday afternoon. I also except to that portion of your Honor's charge wherein your Honor said that Morris Malinsky said that Red Tiplet got a package out of a locker uptown.

The Court: The jury will be guided by the evidence.

Mr. Solovei: I think your Honor was mistaken on that portion. You said "locker," but your Honor probably meant "station."

The Court: Yes.

Mr. Solovei: That is the reason I am referring to it. I also respectfully except to that portion of your Honor's charge wherein your Honor spoke of an oral statement or conversation alleged to have been had at the Bossert Hotel by the defendant Morris Malinsky on October 23, 1942.

The Court: Is my recollection in error when I said that according to Malinsky's testimony he confessed to the crime either late Friday night or early Saturday morning, after he said 4160
he was beaten?

Mr. Solovei: My objection was only as to the word "oral". Your Honor said "oral statement." If your Honor said "statement" without the word "oral"—

The Court: Strike out the word "oral".

Mr. Solovei: Just "statement".

The Court: Yes.

Mr. Solovei: On the question of the episode at the garage, your Honor, I except to that portion of the handkerchief episode wherein your Honor charged in reference to the same. As a 4161
matter of fact, Celano said, if I remember the testimony correctly, that the defendant did take the handkerchief out of his pocket and did place it on the handle, and there was no dispute about it.

The Court: You are quite right. Are those the only exceptions?

Mr. Solovei: Those are the only exceptions that I have, your Honor. Your Honor, on the question of requests, your Honor in charging the jury spoke about the testimony of Dolinsky that he heard three shots fired. I ask your

Honor to charge the jury that Dolinsky further testified that the man that fired the shots is the man that jumped out of the car, the man that bumped into him, and the man that hollered to him, "Drop the bag" and that it was only one man that did all of that, according to his own testimony.

The Court: The jury will be guided by its own recollection of the testimony, and if its recollection of the testimony does not square
4163 with that of the Court it must be guided solely by its own recollection of the testimony, and if at any time the jurors desire any portion of the testimony read, they may return to the court-room and the Court will have such testimony read. Furthermore, I am going to say to the jury at this time, while I think of it, that if while the jury is deliberating in the jury room they want to ask some questions about the law that governs the case, they may return and the Court will elaborate more fully. No juror must be in doubt as to the testimony or as to the law.
4164 A juror, if he is to be a good juror, should come back to the court-room and seek the assistance of the Court if that becomes necessary.

Mr. Solovei: I ask your Honor to charge the jury that a witness who under oath knowingly affirms a proposition and then knowingly denies the same, is not to be credited in either instance as a matter of law.

The Court: I refuse to charge in the language requested.

Mr. Solovei: I except.

The Court: Because it all depends on the surrounding circumstances. Anything further?

Mr. Solovei: Yes; I have just a few. I have

many here, but your Honor charged most of them.

The Court: Take your time. There is no hurry.

Mr. Solovei: I ask your Honor to charge the jury that the question of reasonable doubt applies to each and every essential element of the crime charged in the indictment, and that if any essential element of the crime has not been proven to the satisfaction of the jury beyond every reasonable doubt, that the defendant Morris Malinsky must be given the benefit of that doubt, and the verdict must be that of not guilty. 4166

The Court: I so charge. That is the law in every criminal case. That is the law in this case.

Mr. Solovei: I ask your Honor to charge the jury that the People are bound by the testimony of their own witnesses and that where conflicting testimony exists between the People's witnesses as to any fact, that the defendant Morris Malinsky must be given the benefit of that conflict and the jury must use the construction of the evidence that is most favorable to the defendant Malinsky. 4167

The Court: You have several requests in there; there are several propositions there. I will charge the jury that the People vouch for the credibility of the witnesses that they call. It is for the jury to determine whether or not the witnesses are telling the truth. That is their province. Of course, the defendant is entitled to the benefit of a reasonable doubt on every essential element or fact which bears upon guilt.

Mr. Solovei: The points that I have in this

request, your Honor, is where there is a conflict of testimony between their own witnesses.

The Court: I have charged on the subject of credibility and inconsistencies, and I will let the charge stand as is.

Mr. Solovei: I respectfully except.

Mr. Solovei: I ask your Honor to charge the jury that circumstantial evidence is of no value if the circumstances are consistent with either the hypothesis of innocence or the hypothesis

4169 of guilt.

The Court: I so charge.

Mr. Solovei: I ask your Honor to charge the jury that circumstantial evidence is of no value even if the hypothesis of guilt will account for all the facts proven, where there exists a reasonable hypothesis of innocence.

The Court: I so charge.

Mr. Solovei: I ask your Honor to charge the jury that unless the evidence adduced at the trial, believed by the jury beyond every doubt, excludes every reasonable hypothesis to a moral certainty, except that of the guilt of the defend-

4170 ant; they must vote not guilty and acquit the defendant Morris Malinsky.

The Court: So charged.

Mr. Solovei: I ask your Honor to charge the jury that they are required as a matter of law, in the event that there are two possible constructions to be taken from a given state of facts, one of guilt and one of innocence, that they must accept the construction most favorable to the defendant and reject the unfavorable construction.

The Court: I so charge.

Mr. Solovei: I ask your Honor to charge the

jury that although they may draw reasonable inferences from facts proven in the case beyond every reasonable doubt, they cannot and must not draw an inference from an inference.

The Court: I so charge.

Mr. Solovei: I ask your Honor to charge the jury that the presumption of law is that the defendant did not commit the crime.

The Court: I have already charged that. That is the presumption of innocence.

Mr. Solovei: Your Honor has as to the pre- 4172
sumption of innocence.

The Court: I charge it again.

Mr. Solovei: I ask your Honor to charge the jury that every member of the jury is entitled to his own individual opinion on the facts and is entitled to his own individual opinion as to the credibility of the witnesses, and that each juror, although required, expected and obligated, to discuss the evidence with the other jurors, is not called upon to change his mind or forsake his opinion just because other jurors have an opinion different from his. 4173

The Court: I so charge.

Mr. Solovei: I ask your Honor to charge the jury that if in their consideration of the circumstantial evidence in this case there is at any point in such consideration a reasonable possibility or probability that the defendant Morris Malinsky may be innocent, that the jury is compelled to accept that reasonable possibility or probability and return a verdict of not guilty.

The Court: I so charge.

Mr. Solovei: I ask your Honor to charge the jury that the opportunity to commit the crime, or even knowledge of its commission with-

4174 out believable, reliable, unimpeachable testimony, is not sufficient upon which to base a verdict of guilty.

The Court: I so charge.

Mr. Solovei: I ask your Honor to charge the jury that the mere knowledge that this crime has been committed is not sufficient to remove or eradicate the presumption of innocence.

The Court: I so charge. In other words, you have to prove beyond a reasonable doubt that
4175 he had a hand in it. The mere fact that he knew about it does not make him guilty. That is what I said to you about the definition of accomplices. The mere fact that a man knows about a crime about to be committed does not make him an accomplice, or that he learns that a crime has been committed, does not make him an accomplice. He must have aided and abetted; he must be a principal. That is what Mr. Solovei is asking me to charge. I have charged that to you, but I charge it again. That applies to the defendants, it applies to witnesses, it ap-
4176 plies to everybody.

Mr. Solovei: I ask your Honor to charge the jury that no matter how slight that doubt is that arises, so long as there is a reasonable doubt coming from the evidence, they must acquit the defendant Morris Malinsky.

The Court: I have charged you about reasonable doubt; I charge it again.

Mr. Solovei: Thank you.

The Court: But I have given you a definition of the meaning of reasonable doubt. It is not synonymous with "beyond all possibility of

doubt." You must make a distinction between the two.

Mr. Solovei: I ask your Honor to charge the jury that they must be satisfied beyond a reasonable doubt that the defendant Morris Malinsky is not entitled to a recommendation that he be imprisoned for the term of his natural life, before they can refuse to make such a recommendation.

The Court: There is a late case squarely in point on that subject, that holds against you. Do you want me to send for it? 4178

Mr. Solovei: You mean the Flynn case?

The Court: Was it the Flynn case? Doesn't the Flynn case hold directly against you? (To the attendant) Bring in the Flynn case. (To Mr. Solovei) What is the citation? In other words the People must not show beyond a reasonable doubt that he is not entitled to a recommendation. That is what the Court has held in one of the very late cases. You ask me to charge this jury contra to what our highest court has said?

Mr. Solovei: I really don't know if it is the Flynn case you are talking about. 4179

The Court: It is a very late case. The only thing that the People are required to do is to prove the defendant's guilt beyond a reasonable doubt.

Mr. Solovei: Your Honor refuses my charge, so I take an exception.

The Court: For the present I refuse it, but I am going to make doubly sure that this late case holds what I have just said. I am quite

4180 sure it does. It is a very recent case, Mr. Solovei, in the Court of Appeals.

Mr. Solovei: I ask your Honor to charge the jury that the defendant Morris Malinsky does not have the burden of proving where he was on the date of the alleged crime, but the People as part of their direct case must prove beyond a reasonable doubt that the defendant Morris Malinsky was present and participating in the crime as alleged in the indictment.

4181 The Court: I so charge.

Mr. Solovei: I ask your Honor to charge the jury that even though the public forget the crime or it remains unsolved and shrouded in doubt, unless the jurors find to a moral certainty and beyond a reasonable doubt that the defendant Morris Malinsky aided and abetted Beitler in the commission of the crime, as alleged in the indictment, they must acquit the defendant.

The Court: So charged.

Mr. Solovei: I now ask your Honor to charge the various degrees of homicide.

4182 The Court: Now, if you will point out to me under what possible view of the evidence this defendant is entitled to a charge of the degrees of homicide, I will be happy to charge them. I am going to ask you to do that.

Mr. Solovei: I am very frank to tell your Honor I am making this request as a matter of law.

The Court: You mean as a matter of form?

Mr. Solovei: Well—

The Court: Can you just now point out to me any evidence here which under any possible

view may be considered to be common law murder and therefore the degrees must be charged.

Mr. Solovei: Judge, it is something that has been annoying me all the time during the course of this trial as to whether or not there should be various degrees charged under the statute, or whether your Honor should charge the jury a felony murder here; because I am still in doubt about it, and I am very frank to tell your Honor that it is a very serious proposition with me.

The Court: In other words you cannot advance any reason why I should charge the degrees? 4184

Mr. Solovei: I cannot directly give you any legal reasons now, other than to tell you I believe it ought to be charged.

The Court: You mean you just have "a hunch" it ought to be charged?

Mr. Solovei: Call it what you like.

The Court: Well—

Mr. Solovei: Your Honor refuses the request?

The Court: Wait, I have not said anything.

Mr. Solovei: I mean I thought you said something. May I just finish with what I have here? 4185

The Court: Surely.

Mr. Solovei: I ask your Honor to charge the jury that fear may be produced by threats, expressed or implied.

The Court: I so charge.

Mr. Solovei: I ask your Honor to charge the jury that the evidence here shows that the witness Koyner met Beitler at the Embassy Club in Flatbush in the early morning or early hours of February 16th, 1941.

The Court: The jury will recall the evidence.

4186

I do not recall it, but they will be guided by their own recollection.

Mr. Solovei: Your Honor went over his testimony—evidently overlooked it.

The Court: If the jury recalls it they will take it into consideration.

Mr. Solovei: I ask your Honor to charge the jury that while Spielfogel said he talked to Lawrence and to Kovner at Sing Sing, Kovner testified here he never spoke to Spielfogel at

4187 Sing Sing about this case.

The Court: The jury will recall the evidence and be guided by their own recollection.

Mr. Solovei: I except. I ask your Honor to charge the jury that Spielfogel said that he was sore or angry at the defendant Malinsky, and that they have a right to take that into consideration during their deliberations as to the credibility that they are going to place upon the testimony given by the witness Spielfogel.

The Court: I so charge.

Mr. Solovei: I also ask your Honor to charge

4188 the jury that Spielfogel admitted here in open court that at Elmira he was in what he called the bughouse for seven or eight months; and they can take that into consideration during their deliberations as to whether or not he is telling the truth here or the credibility they will give to his testimony.

The Court: I so charge.

Mr. Solovei: That is all.

The Court: Will you step up to the bench, please, Mr. Solovei.

(The Court and Mr. Solovei confer at the bench, and at the end of the conference the

stenographer was called up and Mr. Solovei made the following statement not within the hearing of the jury:

"Mr. Solovei: The request to charge the various degrees of homicide is withdrawn by counsel for the defendant Morris Malinsky.")

The Court: Are you finished, Mr. Solovei?

Mr. Solovei: Yes.

The Court: Let us see—who is on the list after Malinsky? Rudish.

Mr. Carabba: May it please your Honor, on 4190
behalf of the defendant Rudish, I wish to take an exception to that part or that portion of your Honor's charge wherein your Honor referred to the witness Spielfogel, that under any circumstances the witness Spielfogel cannot be deemed an accomplice as a matter of law.

The Court: I have left it as a question of fact for the jury. You have your exception.

Mr. Carabba: May I respectfully except to that portion of your Honor's charge wherein while the Court was charging with reference to the testimony of the defendant Rudish, wherein he is alleged to have made an oral statement 4191
to the witness Spielfogel, and your Honor referred to his statement as a confession. I wish to take an exception to that part of your Honor's charge wherein you refer to the oral statements of Rudish to Spielfogel as a confession. As to whether it was a confession depends upon what he said.

The Court: I will change the word "confession" to "statement". I will amend my reference to the conversation and call it a statement. It is for the jury to say whether it is a confession.

4192 Mr. Carabba: May I except to your Honor's—

The Court: How would you want me to charge it?

Mr. Carabba: Your Honor in charging the jury has referred to the oral statements of the defendant Rudish, alleged to have been made to Spielfogel, as a confession; and in connection with that your Honor read the statute on confessions.

The Court: Is your complaint about the lan-
4193 guage of the Court because it referred to the statement as being oral, and that therefore, it cannot be a confession?

Mr. Carabba: No.

The Court: I don't get the point.

Mr. Carabba: My point is that it is not a confession.

The Court: Why not?

Mr. Carabba: I say it is not.

The Court: Why not?

Mr. Carabba: Because the mere fact that Rudish said to the witness—is alleged to have said to the witness Spielfogel on a certain day
4194 that he did certain things, that that of and by itself is not a confession, unless it is by other evidence adduced here by the prosecution—no proof here—

The Court: No; you are wrong on the law. So that the jury will not be misled by what you have said, the other evidence referred to is not independent witnesses connecting the defendant with the crime; the other evidence referred to is proof that the crime is committed by some one. The confession if believed by the jury to be sufficient is enough to tie a defendant

to the commission of the crime. The other evidence referred to is that the crime itself was committed—not necessarily by the defendant, but that the crime was committed. I believe I gave the jury an illustration of a man walking into a station house to the lieutenant and saying, "I killed John Jones." That is not enough. The State must prove that John Jones was in fact killed—not necessarily by the defendant, by this other evidence, but that John Jones was killed.

Mr. Carabba: I ask your Honor to charge 4196
the jury as a matter of law that the witness Spielfogel is the only alleged witness offered by the prosecution as corroborative with the exception of the witness Yellin.

The Court: I think that is right. I so charge.

Mr. Carabba: I ask your Honor, respectfully, to charge that the jury must believe that the corroborative evidence must be reliable, believable and unimpeachable testimony, beyond a reasonable doubt. I am referring only to the corroborative—

The Court: In other words, the corroborative 4197
testimony need not prove the defendant's guilt; it must only tend to prove the defendant's guilt.

Mr. Carabba: It must be connected, your Honor.

The Court: Exactly.

Mr. Carabba: That is my point.

The Court: It must tend to connect the defendant with the commission of the crime.

Mr. Carabba: Will your Honor charge in the language that I have requested?

The Court: I will let the language that I have

4198 *Requests to Charge and Exceptions*

given the jury in my main charge stand. I refuse to charge any further.

Mr. Carabba: May I have an exception?

The Court: You have. I have charged very fully on that subject.

Mr. Carabba: May I respectfully except to that part of that portion of your Honor's charge wherein you refer to the testimony of the witness Hollingsworth, the alleged owner, I think of the automobile; and your Honor asked the
4199 jury to consider the testimony of Hollingsworth as against the defendant Rudish.

The Court: What have you in mind?

Mr. Carabba: On the question of whether or not the automobile was stolen by the defendant Rudish, in connection with the commission of the crime charged in this indictment.

The Court: Of course, you will recall, Mr. Carabba, that if the testimony of the People's witness is true, Rudish confessed it to him that he went to Brooklyn and stole a car, and with that car went back to Manhattan, picked up Beitler, picked up Malinsky, drove out to Coney
4200 Island in this car which he stole, to the restaurant, from the restaurant to the scene of the alleged shooting, and then he and his companions made their escape and he abandoned the car near the scene; that is, a few blocks away. The car is allegedly identified by the Coney Island witnesses.

Mr. Solovei: May I respectfully take an exception to that statement of your Honor, as far as Malinsky is concerned.

The Court: His statement is not binding on Malinsky. We are now discusisng Rudish.

Mr. Solovei: I don't recall he said he picked up Beitler and Malinsky.

The Court: Yes, he did. There is no question in my mind about that; and if the jurors disagree with me they will be guided by their own recollection. Am I correct, gentlemen of counsel, that that is what Rudish is alleged to have said to Spielfogel? What do you say, Mr. Geoghan?

Mr. Geoghan: I don't recall. I don't say he did not.

4202

The Court: What is your recollection, Mr. Carabba?

Mr. Carabba: I have no independent recollection.

The Court: Well, I have.

Mr. Carabba: Except when this note was made—

The Court: I am not interested in notes you have. I have an independent recollection that Rudish is alleged to have told Spielfogel, according to Spielfogel's testimony, that he, Rudish, went out to Brooklyn to see Uncle Sonenblick, it then being about nine o'clock; and having 4203 an appointment with Beitler and with Malinsky in New York to go out on this job, he hurried back in this stolen automobile to New York, picked up Malinsky, then picked up Beitler in another place, then they all drove out to Coney Island and stopped at the Cosmo Restaurant. I have a distinct recollection that such evidence was given. However, the jury will be guided by their own recollection; if there is any question about it the jury can have the testimony read. What is the next point? What is the point about

the reception of this evidence? What objection is there as to that? I would like to hear you.

Mr. Carabba: That this evidence has not connected the defendant Rudish with the commission of the crime.

The Court: It is merely received on the general issue.

Mr. Carabba: Your Honor has charged this jury that the witness Yellin is an accomplice.

The Court: I have charged them that Yellin
4205 is an accomplice: I charge them again he is an accomplice as matter of law.

Mr. Carabba: I respectfully except to that part or that portion of your Honor's charge wherein your Honor said, "We must accept the testimony of convicts".

The Court: I never said any such thing.

Mr. Carabba: If that be in the record—

The Court: I never said any such thing. The jury is not bound to accept the testimony of any witness, whether it be a banker or a convict. It is for them to say whether they are going to accept the testimony of any witness,
4206 no matter who he is. They are the judges of the credibility of the witnesses. What I did say is that they should not arbitrarily reject the testimony of any witness, no matter who he is.

Mr. Carabba: With reference to the witness Sonenblick, wherein you refer to his testimony in your Honor's charge to the jury here, may I take an exception to what your Honor said concerning the witness Sonenblick, as against the defendant Rudish.

The Court: You have your exception.

Mr. Carabba: Exception. May I respectfully

have an exception with reference to that portion of your Honor's charge wherein your Honor referred to the witness Jalkover's testimony on cross-examination by the District Attorney, that it was in 1940 that that introduction was made.

The Court: Isn't that your recollection of the testimony?

Mr. Carabba: No; your Honor recalls that the witness—

The Court: Then the jury will be guided by their own recollection of the testimony. They 4208
may have the testimony read at any time if they please, if there is any doubt in their minds as to the testimony. They should not be guided by the Court's recollection if it does not square with their own. Proceed.

Mr. Carabba: I respectfully ask your Honor to charge this jury that the combined testimony of the witnesses Yellin and Spielfogel, standing alone, is insufficient as matter of law to warrant a conviction as against the defendant Rudish.

The Court: I refuse so to charge.

Mr. Carabba: And I respectfully except. I 4209
ask your Honor respectfully to charge this jury that they are not bound to accept the denials of the witnesses Yellin and Spielfogel that no promise of reward was made to them or that they were hopeful of some reward.

The Court: I so charge.

Mr. Carabba: I respectfully ask your Honor to charge this jury that the prosecution has failed to submit any evidence of flight or enrichment as against the defendant Rudish.

The Court: I so charge.

Mr. Carabba: I ask your Honor respectfully

to charge this jury that they may find from the evidence adduced here that the witness Spielfogel is an accomplice.

The Court: I so charge.

Mr. Carabba: May I ask your Honor to charge this jury that the jury may find that Yellin and Spielfogel were accomplices, and in that event they must acquit the defendant Rudish.

The Court: I have charged that Yellin is an accomplice as a matter of law, and I have also
4211 charged—I have submitted Spielfogel's status as an accomplice as a question of fact for the jury to determine. I do so charge as requested.

Mr. Carabba: I request your Honor to charge the jury that Spielfogel is an accomplice as a matter of law.

The Court: I refuse so to charge.

Mr. Carabba: Exception. I ask your Honor respectfully to charge the jury that if they find that the defendants Rudish and Malinsky did not know and meet each other prior to February 15th, 1941, they must acquit the defendant
4212 Rudish.

The Court: Suppose you come up here and we will talk about it. Come up, Mr. District Attorney.

(There was a conference at the bench participated in by the Court, Mr. Carabba and Mr. McGough.)

The Court: I so charge. Proceed.

Mr. Carabba: I ask your Honor respectfully to charge this jury that during Mr. McGough's summation to the jury he referred to the defendant Rudish as an auto mechanic. I ask your Honor to charge this jury that the mere fact

that he is an auto mechanic, they shall not infer from that fact alone that he had anything to do with the commission of this crime.

The Court: I so charge. As I take it, if I recall correctly, Mr. McGough stated to the jury that it is a man who is an auto mechanic that is likely to have the knowledge how to tamper with wires in a car so as to start the car without the use of the ignition key. I think that was his argument.

Mr. Carabba: I say respectfully that the jury, 4214
your Honor, has no right to infer that the defendant participated in the commission of this crime because of the fact that he is an automobile mechanic.

The Court: No; not solely because of that. That in and of itself means nothing.

Mr. Carabba: Your Honor will give me an exception?

The Court: Surely. I have charged as you requested. Do you need an exception? I agreed with you that the mere fact that the man is an auto mechanic, that standing alone does not 4215
prove that he is guilty, but that may be considered together with all the other circumstances.

Mr. Carabba: I ask your Honor respectfully to charge the jury that the quantity of witnesses is not controlling to shut out quality.

The Court: I so charge.

Mr. Carabba: I ask your Honor respectfully to charge the jury that the defendant Rudish need not prove where he was on the evening of February 15th, 1941.

The Court: I so charge. The burden of proof

is on the People to establish his guilt beyond a reasonable doubt.

Mr. Carabba: But the prosecution must establish beyond a reasonable doubt that the defendant was in Coney Island on the evening of February 15th, 1941 participating in the commission of this robbery.

The Court: I so charge.

Mr. Carabba: If your Honor pleases, my associate, Assemblyman Morritt, made some notes while I was making my own.

4217

The Court: I will give you time to read them, and if you have anything further to ask the Court, I will wait.

Mr. Carabba: I understand the Assemblyman himself would like to read them—

The Court: No; you will make them. I will not hear three lawyers for one defendant—just one lawyer.

Mr. Carabba: I will take them one at a time. I ask your Honor to charge this jury that the jury may acquit due to the failure of the witness Dolinsky to identify any of the defendants.

4218

The Court: No; in lieu thereof I will charge that the jury must be satisfied beyond a reasonable doubt from all of the evidence in the case, as adduced against the defendant Rudish, considering also the evidence offered in his behalf, before they may find him guilty.

Mr. Carabba: May I have an exception?

The Court: You have your exception. All right; next defendant.

Mr. Morritt: He has not finished, if your Honor please.

The Court: I thought you were finished. Proceed, Mr. Carabba.

Mr. Carabba: May I take an exception to your Honor's charge wherein your Honor referred to the short man, the testimony of the short man, and the person in the back with slick hair; as utterly without probative value, and not relevant, and cannot be regarded by the jury as either real or direct or even circumstantial evidence. I have difficulty in reading it.

The Court: I have difficulty in understanding it. I don't quite understand what you mean.

(Read to the Court by the stenographer.) 4220

The Court: As I recall it, one of the witnesses on the scene there testified that he saw this automobile go by; that the driver of the automobile was a short man; that there was another man in the back of the car who was bent over or stooped over. He was a thin man who had hair that was slicked back. If the recollection of the jury differs from mine, the jury will be guided by its own recollection.

Mr. Carabba: Exception.

The Court: Go ahead.

Mr. Carabba: I ask your Honor to charge the jury that the defendant Rudish was never convicted of a felony. 4221

The Court: I so charge.

Mr. Carabba: May I respectfully take an exception to that part, that portion of your Honor's charge wherein your Honor referred to a confession to a private person and to a District Attorney?

The Court: What do you have in mind, Mr. Carabba?

Mr. Carabba: Well, I had in mind that the defendant Rudish, as your Honor recalled, is alleged to have made certain oral statements to

one of the witnesses here, and I contend respectfully that that statement, if it was made, is not a confession and not binding on the defendant Rudish; that section that your Honor read to the jury has no bearing in so far as Rudish is concerned.

The Court: You have your exception, and I tell this jury that you are not stating the law properly. They will be guided by my statement of the law, not by yours. So there will be no
4223 misapprehension, a confession may be made to a private person, no matter who that private person is, and it is no matter where it is made, whether inside of a court-room, in the corridor, or over there on Seventh Street and Avenue D; and a confession so made, voluntarily made, and if the confession be true, is just as binding on the one who makes it as if it had fifty seals on it, and was made before a judge or a notary public or a district attorney or in any other of the accepted manners. That is the law.

Mr. Carabba: This is my last one, Judge Leibowitz: May I respectfully except to your
4224 Honor's failure to charge on the question of intimidation—

The Court: Any more requests?

Mr. Carabba: That is all. I did not finish this.

The Court: I will hear every request you want to make.

Mr. Carabba: I am all through with requests. Just one more objection. Your Honor will note that I did not give them in order, because some of them were handed to me by Mr. Meadow, and some were handed to me by Assemblyman Morritt.

The Court: Perfectly all right, Mr. Carabba. Take your time. I will pass on everything you have. Don't be hurried.

Mr. Carabba: This is the last one, and I will courteously sit down.

The Court: All right.

Mr. Carabba: May I respectfully except to the failure of the Court to charge the jury on the question of intimidation of the witness Jalkover, called on behalf of the defendant Rudish. Your Honor will recall—

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The Court: I know what you have in mind. The witness Jalkover's credibility is left as well to be decided by the jury, and they will take into consideration all the circumstances that were developed both on direct and on cross-examination, in passing upon his credibility.

Mr. Carabba: Exception.

The Court: Next defendant.

Mr. Multer: On behalf of the defendant Indovino, there is some confusion in our minds as to whether or not a motion for a direction of acquittal was made on his behalf at the close of the entire case. I would like the record to show that we did make that motion, your Honor denied it, and we took an exception.

4227

The Court: Very well.

Mr. Multer: We respectfully except to the entire charge in so far as it permits this jury to find Indovino guilty of any crime or participation in the crime charged.

The Court: You have your exception.

Mr. Multer: We except to so much of your Honor's charge that this jury may consider the testimony of Yellin as against the defendant Indovino.

4228 *Requests to Charge and Exceptions*

The Court: Proceed.

Mr. Multer: And to so much of the charge that the witness Kovner as a matter of law is not an accomplice, and that the testimony of the witness Kovner may be considered as against the defendant Indovino, and to so much of this charge as permits this jury to speculate as to whether either Beitler or Malinsky did the killing here; and so much of the charge as implies that there is no corroboration of the truth of
4229 Kovner's testimony as against Indovino. Those are my exceptions.

The Court: Now the requests.

Mr. Multer: In connection with our requests to charge, I ask your Honor to tell the jury that these requests, made by all counsel, as well as by myself, that in so far as your Honor says you so charge, they become the law of the case just as though they were incorporated in your original charge.

The Court: I so charge.

Mr. Multer: I ask your Honor to charge the jury that the presumption of innocence is not
4230 a mere formality; each juror is bound to entertain it conscientiously, sincerely and ungrudgingly, without a reservation or evasion whatsoever, and the defendants must be given the full benefit thereof.

The Court: I so charge.

Mr. Multer: I ask your Honor to charge the jury that if after considering the evidence they find it is susceptible of two constructions, one indicating a defendant's innocence and the other his guilt, they must give the defendants the benefit of the innocent construction and acquit them accordingly.

The Court: I so charge.

Mr. Multer: I ask your Honor to charge the jury that association or acquaintanceship after the commission of the homicide, between Indovino and any of the other persons mentioned during the course of this trial, is not evidence of the guilt of the defendant Indovino upon this indictment and may not be so considered by the jury.

The Court: I so charge.

Mr. Multer: I ask your Honor to charge the jury that each and every juror must decide for himself, after an exchange of ideas— 4232

The Court: Didn't one of the other lawyers ask the same thing, and I charged it?

Mr. Multer: Your Honor charged it also in behalf of Indovino?

The Court: I charged in behalf of Indovino. If you want me to repeat it I will charge it again.

Mr. Multer: I don't want to unduly burden the Court or this jury. I have had a lot of requests to make and I have stricken them out, because I think your Honor covered them. If I do repeat it is unintentional. 4233

The Court: All right; even if you repeat, you are committing no sin or trespass. You have been very gracious throughout the trial.

Mr. Multer: I ask your Honor to charge the jury that questions asked and answered in the negative may not be considered as proving or giving rise to any inference that the affirmative is true.

The Court: On the one hand I am asked to charge that because a witness says he has no

interest in the case, the jury is not bound by his negative answer; and then I am asked to charge that where a witness testifies that a certain thing happened, that that does not prove that it did happen. But in your instance I will charge as requested.

Mr. Multer: I ask your Honor to charge that this jury may consider as a question of fact, and determine it as such, whether or not Kovner was an accomplice.

4235 The Court: I refuse so to charge.

Mr. Multer: Exception. I ask your Honor to charge that the jury if it has a reasonable doubt as to the truth of Kovner's testimony it must acquit the defendant Indovino.

The Court: I so charge.

Mr. Multer: And that if any individual juror has such a reasonable doubt as to the truth of Kovner's testimony, he cannot find the defendant Indovino guilty.

The Court: I so charge.

Mr. Multer: I ask your Honor to charge the jury that the testimony referred to as alleged

4236 confessions of Rudish and Malinsky in no way implicated Indovino and may not be considered by this jury as against Indovino.

The Court: I so charge.

Mr. Carabba: I still contend Rudish made no confession.

Mr. Multer: I used the word "alleged".

The Court: That is for the jury to say.

Mr. Multer: As to your Honor's charge on the question of reasonable doubt, I ask your Honor to charge this jury that a reasonable doubt is a doubt arising from such fact or facts

in this case as lead the jury as intelligent men to act impartially on the evidence to the conclusion that they are not wholly satisfied in their own minds that the defendant is guilty of the crime charged against him here and now, and it is such a doubt as after a careful consideration of all the evidence in this case leaves their minds in such a state that they cannot say that they are convinced to a moral certainty of the truth of the charge against the defendants; and on the whole case they are not convinced to a moral certainty as to the guilt of the defendants and 4238
they have a reasonable doubt, and they must return a verdict of not guilty.

The Court: Well, that is putting it in different language, but it means the same thing. It means reasonable doubt is synomymous with the phrase—that is, the phrase "beyond a reasonable doubt" is synonymous with the phrase "to a moral certainty." I charge as you request: the People must prove the defendants guilty beyond a reasonable doubt, but the words "reasonable doubt" do not mean the same thing as "beyond all possibility of doubt." 4239

Mr. Multer: I respectfully except to your Honor's refusal to charge in the language requested.

The Court: I have charged in the language requested. I so charge.

Mr. Multer: I ask your Honor to charge this jury that no defendant has the burden of proving anything.

The Court: Oh, why make a request of that kind? I have already charged that the burden of proof is on the People and never shifts.

Mr. Multer: In that connection I want your

Honor to charge the jury that even if the defendant called witnesses or takes the stand himself, he still assumes no burden to prove his innocence.

The Court: I have charged it, and charge it again as requested.

Mr. Multer: In connection with the matter of corroborative evidence of the accomplice's testimony, I ask your Honor to charge this jury that the corroborative evidence must apply to the defendant's identity as a participator in the crime,

4241 and not merely connects him with the persons committing it.

The Court: I so charge.

Mr. Multer: And that such evidence must tend to connect the defendant with the commission of the crime, and it must be from an independent source, it must be credible, and it must convince the jury beyond a reasonable doubt.

The Court: The corroborative evidence, plus the evidence of the accomplice, must convince the jury beyond a reasonable doubt of his guilt. In other words, all of the evidence adduced in

4242 behalf of and against a particular defendant must convince the jury beyond a reasonable doubt of his guilt, otherwise he is entitled to an acquittal.

Mr. Multer: Thank you, sir.

The Court: Now, gentlemen, take this case and do justice without fear or favor. Let me remind you again what your verdicts may be: As to each defendant, announcing a separate verdict as to each defendant—

Not Guilty,

Guilty as Charged, which means the death penalty; or

Guilty as Charged with a Recommendation of Life Imprisonment.

You may retire, gentlemen, and consider your verdict. The 13th and 14th jurors, the alternates in this case, are now discharged from further duties in connection with this case, with the thanks of the Court. The defendants are remanded. Gentlemen, what is the attitude of counsel on both sides with reference to exhibits?

Mr. McGough: I will consent they go in.

Mr. Geoghan: Except the statement. 4244

The Court: Well, who is here—you are the defendant Malinsky's counsel—what about the exhibits, Mr. Solovei?

Mr. Solovei: I don't know.

The Court: Do you consent or do you not?

Mr. Solovei: I have no objection.

The Court: All right then, you consent. What about the counsel for the defendant Rudish?

Mr. Carabba: The defendant Rudish excepts to any exhibits, because none of them are binding on him.

The Court: No; I mean if the jury wants the exhibits in the jury room? 4245

Mr. Meadow: No objection.

The Court: What about the exhibits, Mr. Geoghan, in behalf of Indovino?

Mr. Geoghan: I have no objection to the exhibits except one. That Mr. McGough and I have agreed should not go in.

Mr. McGough: That is the statement of Malinsky.

Mr. Geoghan: The statement that was read; that is the only one.

The Court: Has that been deleted?

4246 *Colloquy*

Mr. McGough: In the case of that statement, I have an exact copy of it made with those names taken out. If all parties consent we can mark that.

Mr. Solovei: I object to the statement.

The Court: Must not say anything more with reference to it. Let us not say another word except, with reference to the confession of Malinsky so-called, the jury may have all of the other exhibits? Is that plain? Now, gentle-
4247 men, if you want this alleged confession read—if you want to refresh your recollection as to what it says—you may come back to the court-room and I will have the stenographer read it from his minutes. Is that plain? Even though I am not sending it into the jury room, that does not foreclose you from having your recollections refreshed as to what is in that document, namely, the alleged confession of Malinsky; but if you wish you may come back to the court-room and I will have Mr. Roberts read it to you.

Mr. Solovei: I take an exception to that, your
4248 Honor.

The Court: You have your exception. All right, you may retire, gentlemen, and consider your verdict.

(The jury retired at 5:32 p.m. and returned at 9:50 p.m. The defendants were in court with the following counsel: Mr. Solovei, representing Malinsky, Mr. Longo, representing Indovino, Mr. Morritt, Mr. Carabba and Mr. Meadow representing Rudish. Mr. McGough was present representing the People.)

4249

(The roll was called by the clerk.)

The Clerk: Gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: Rise, Mr. Foreman. How say you?

The Court: Now, just a moment. Call for each name.

The Clerk: What is your verdict as against the defendant Malinsky?

4250

The Foreman: We find the defendant Malinsky Guilty as Charged.

The Clerk: Is that all?

The Foreman: That is all.

The Court: That means you are not making a recommendation for Malinsky?

The Foreman: Yes, sir.

The Clerk: What is your verdict as to the defendant Rudish?

The Foreman: To the defendant Rudish, we find him Guilty as Charged.

The Court: That means, Mr. Foreman, you are not making a recommendation for Rudish?

4251

The Foreman: Right.

The Clerk: What is your verdict as to the defendant Indovino?

The Foreman: As to the defendant Indovino, we find him Guilty as Charged with Recommendation for Life Imprisonment.

Indovino: I don't want that.

Mr. Solovei: I ask that the jury be polled.

The Clerk: Harken to your verdict as the Court records it: You and each of you say you find the defendant Malinsky Guilty as Charged

4252 *Verdict*

in the indictment, and find the defendant Rudish Guilty as Charged in the indictment, and the defendant Indovino Guilty as charged in the indictment with a Recommendation for Life Imprisonment.

The Foreman: Yes, sir.

The Clerk: So say you all?

Mr. Solovei: I ask that the jury be polled.

The Court: Poll the jury for the defendant Malinsky.

4253 The Clerk: Louis J. Yearsley, you say that you find the defendant Malinsky Guilty as Charged in this indictment?

Mr. Yearsley: Yes, sir.

The Clerk: Is that your verdict?

Mr. Yearsley: My verdict.

The Clerk: Franklin Brower, is that your verdict?

Mr. Brower: Yes, sir; that is.

The Clerk: Timothy J. Buckley, Jr., is that your verdict?

Mr. Buckley: Yes.

4254 The Clerk: Harold W. Burns, is that your verdict?

Mr. Burns: Yes, sir.

The Clerk: Eugene F. Corwin, is that your verdict?

Mr. Corwin: Yes, sir.

The Clerk: Isidore M. Horowitz, is that your verdict?

Mr. Horowitz: Yes, sir.

The Clerk: Charles A. Beier, is that your verdict?

Mr. Beier: It is.

4255

The Clerk: Richard V. Schnibbe, is that your verdict?

Mr. Schnibbe: It is.

The Clerk: Lester Randall, is that your verdict?

Mr. Randall: It is.

The Clerk: Joseph A. Machles, is that your verdict?

Mr. Machles: It is.

The Clerk: Rudolph A. Weiss, is that your verdict?

4256

Mr. Weiss: It is.

The Clerk: Karl J. H. Eckert, is that your verdict?

Mr. Eckert: It is.

The Clerk: All answer in the affirmative, sir.

Mr. Carabba: I move in behalf of the defendant Rudish.

The Court: You ask to have the jury polled?

Mr. Carabba: On behalf of the defendant Rudish, yes.

The Court: Poll the jury.

The Clerk: Louis J. Yearsley, you say you find the defendant Rudish Guilty as Charged in this indictment, is that your verdict?

4257

Mr. Yearsley: That is true.

The Clerk: Franklin Brower, is that your verdict?

Mr. Brower: Yes, sir.

The Clerk: Timothy J. Buckley, Jr., is that your verdict?

Mr. Buckley: Yes.

The Clerk: Harold W. Burns, is that your verdict?

Mr. Burns: Yes; that is correct.

4258 *Verdict*

The Clerk: Eugene F. Corwin, is that your verdict?

Mr. Corwin: Yes, sir.

The Clerk: Isidore M. Horowitz, is that your verdict?

Mr. Horowitz: Yes, sir.

The Clerk: Charles A. Beier, is that your verdict?

Mr. Beier: It is.

The Clerk: Richard V. Schnibbe, is that your verdict?

4259 Mr. Schnibbe: It is.

The Clerk: Lester Randall, is that your verdict?

Mr. Randall: It is.

The Clerk: Joseph A. Machles, is that your verdict?

Mr. Machles: Yes, sir.

The Clerk: Rudolph A. Weiss, is that your verdict?

Mr. Weiss: It is.

The Clerk: Karl J. H. Uckert, is that your verdict?

4260 Mr. Uckert: Yes, sir.

The Clerk: All of the jurors answer in the affirmative.

Mr. Longo: I request the jury be polled for Indovino.

The Court: Poll the jury.

The Clerk: Louis J. Yearsley, you say you find the defendant Indovino Guilty as Charged in this indictment with a Recommendation for Life Imprisonment. Is that your verdict?

Mr. Yearsley: Yes, sir.

The Clerk: Franklin Brower, is that your verdict?

Mr. Brower: Yes, sir.

The Clerk: Timothy J. Buckley, Jr., is that your verdict?

Mr. Buckley: Yes.

The Clerk: Harold W. Burns, is that your verdict?

Mr. Burns: Yes.

The Clerk: Eugene F. Corwin, is that your verdict?

Mr. Corwin: Yes, sir.

The Clerk: Isidore M. Horowitz, is that your verdict? 4262

Mr. Horowitz: It is.

The Clerk: Charles A. Beier, is that your verdict?

Mr. Beier: Yes, sir.

The Clerk: Richard V. Schnibbe, is that your verdict?

Mr. Schnibbe: Yes, sir.

The Clerk: Lester Randall, is that your verdict?

Mr. Randall: Yes, sir.

The Clerk: Joseph A. Machles, is that your verdict? 4263

Mr. Machles: Yes, sir.

The Clerk: Rudolph A. Weiss, is that your verdict?

Mr. Weiss: Yes, sir.

The Clerk: Karl J. H. Uckert, is that your verdict?

Mr. Uckert: Yes, sir.

The Clerk: All of the jurors answer in the affirmative, sir.

(The clerk took the pedigrees of Malinsky and Indovino; the defendant Rudish refused to answer any questions.)

4264 *Colloquy*

The Court: Counsel for Malinsky, do you desire to make any motion?

Mr. Solovei: I ask that I be permitted to reserve my motions at this time and I will make them in the future when your Honor intends to pass judgment.

The Court: Application granted. Mr. Carabba, do you desire to make any motions?

Mr. Carabba: I ask leave, if your Honor please, if your Honor will give me an opportunity to make them on the day of sentence?

426

The Court: That application is granted.

Mr. Longo: Same motion on behalf of the defendant Indovino.

The Court: That application is granted. The defendants are remanded.

Brooklyn, N. Y., July 19, 1943

SENTENCE OF THE COURT

4266

Mr. Solovei: This is a motion on behalf of the defendant Malinsky, which was joinned in by all the other defendants, your Honor, moving to amend the record as appears in the motion papers. While the record shows what I asked your Honor in this case, I am just making this motion for the purpose of protecting the defendant's rights which I believe every lawyer must do and should do, and that is, he has no alternative, so as to remove any ambiguity that may arise in the Court

of Appeals because this case must eventually go there, your Honor, and that is the reason for this motion. I believe it is page 1371, Judge.

The Court: Mr. McGough, will you please step around here. Step around and take the stand. Swear the witness.

JAMES A. McGOUGH, residing at 221—77th Street, Brooklyn, New York City, called as a witness by the Court, being duly sworn by the 4268
Clerk, Mr. Caulfield, testified as follows:

By the Court:

Q. Mr. McGough, were you present at the time when the Judge concluded his charge to the jury? A. Yes, your Honor.

Q. And you were present in the courtroom? A. That is right.

Q. And seated at the front of the District Attorney's table? A. Yes, your Honor.

Q. Right near the stenographer? A. Yes.

Q. Did you have a full view of the courtroom? 4269
A. I certainly did Judge.

Q. Do you recall, Mr. McGough, that the Court said as follows, reading from page 1371: "You may retire, gentlemen, and consider your verdict. The 13th and 14th jurors, the alternates in the case, are now discharged from further duties in connection with this case, with the thanks of the Court. The defendants are remanded. Gentlemen, what is the attitude of counsel on both sides with reference to exhibits?

"Mr. McGough: I will consent they go in.

"Mr. Geoghan: Except the statement.

"The Court: Well, who is here—you are the defendant Malinsky's counsel—what about the exhibits, Mr. Solovei?

"Mr. Solovei: I don't know.

"The Court: Do you consent or do you not?

"Mr. Solovei: I have no objection.

4271 "The Court: All right then, you consent. What about the counsel for the defendant Rudish?

"Mr. Carabba: The defendant Rudish excepts to any exhibits, because none of them are binding on him.

"The Court: No; I mean if the jury wants the exhibits in the jury room?

"Mr. Meadow: No objection.

"The Court: What about the exhibits, Mr. Geoghan, in behalf of Indovino?

"Mr. Geoghan: I have no objection to the exhibits except one. That Mr. McGough and I have agreed should not go in.

4272 "Mr. McGough: That is the statement of Malinsky.

"Mr. Geoghan: The statement that was read; that is the only one.

"The Court: Has that been deleted?

"Mr. McGough: In the case of that statement, I have an exact copy of it made with those names taken out. If all parties consent we can mark that.

"Mr. Solovei: I object to the statement.

"The Court: You must not say anything more with reference to it. Let us not say another word except, with reference to the confession of Malinsky so-called, the jury may have all of the other exhibits. Is that plain? Now, gentlemen, if you want this alleged confession read —if you want to refresh your recollection as to what it says—you may come back 4274
to the courtroom and I will have the stenographer read it from his minutes. Is that plain? Even though I am not sending it into the jury room, that does not foreclose you from having your recollections refreshed as to what is in that document, namely, the alleged confession of Malinsky; but if you wish you may come back to the courtroom and I will have Mr. Roberts read it to you.

"Mr. Solovei: I take an exception to that, your Honor.

4275

"The Court: You have your exception. All right, you may retire, gentlemen, and consider your verdict."

Do you recall this entire transaction? A. Yes, Judge, I have a definite recollection of that.

Q. Do you recall whether or not during this entire colloquy the defendants were removed from the courtroom? A. No, they were in the courtroom.

Q. Now just tell us your best recollection. A. Your Honor, at the time that your Honor was

about to excuse the two alternates, I was on my feet because I had in mind to inquire with respect to the exhibits, and at the moment that your Honor said, "The defendants are remanded", your Honor also in the same paragraph as shown by the record, added, "Gentlemen, what is the attitude of counsel on both sides with reference to the exhibits?" It was at that particular moment that the bailiffs were about to take the three defendants out of the
4277 courtroom and your Honor moti ed.

Q. The Judge motioned, indicating with the right hand? A. You indicated with your right hand, and the bailiffs, with the defendants, remained at the edge of the opposite jury box, and they stood there, as I did myself, while the narration that your Honor just read took place. At no time while the jury was in the room were these defendants taken out of the room.

The Court: All right, step down, Mr. McGough.

4278 (Mr. McGough leaves the witness-stand.)

The Court: Mr. Harvey, take the stand, please.

Testimony of James J. Harvey After Verdict 4279

JAMES J. HARVEY, residing at 24802 Memphis Avenue, Rosedale, Long Island, N. Y., called as a witness by the Court, being duly sworn by the Clerk, Mr. Caulfield, testified as follows:

By the Court:

Q. Are you a reporter associated with the Standard News? A. Yes, sir.

Q. A news agency, covering news in Brooklyn? A. Yes, sir. 4280

Q. And you are assigned to this court? A. I am.

Q. And have been for upwards of 25 years? A. Yes, sir.

Q. Mr. Harvey, were you present at the time that the Court concluded its charge to the jury? A. Yes, I was standing right behind Mr. Solovei.

Q. And were you present during the colloquy concerning the sending of the exhibits to the jury room? A. I was.

Q. When the Court asked counsel, if counsel consented that the exhibits go into the jury 4281
room? A. Yes, sir, I was.

Q. Give me in your own words your recollection as to what transpired especially with reference to the removal of the defendants from the courtroom. A. Well, the question came up about the exhibits and you said—oh, yes, you remanded the defendants, and the defendants had gone around the side.

Q. In the courtroom? A. In the courtroom. You said, "Bring them back," and then you said, "No, let them stay there," and they stayed

4282 *Testimony of James J. Harvey After Verdict*

over there. My recollection is they stayed over there on the side.

Q. Continue. A. In that other courtroom jury box, leaning over there, and they stood right there. I was standing behind Mr. Solovei there.

Q. Did the defendants leave the courtroom at any time during the colloquy concerning the exhibits? A. No, they did not, because after it was finished, you said, "All right, they can go ahead; remanded." You repeated the thing "remanded." They were not at their seats. They were over behind the jury box.

4283

Q. But they were in the courtroom? A. Yes, sir, in the courtroom.

Q. In the presence of the Court? A. Yes.

The Court: Step down, Mr. Harvey.

Mr. Solovei: Does your Honor hold that we can examine these witnesses?

The Court: If you wish to examine them, I will permit you to examine them. If you wish to ask Mr. McGough any questions, I will permit you to do that.

4284

Mr. Solovei: Yes.

The Court: If you wish to ask Mr. Harvey any questions I will permit you to do that.

Mr. Solovei: Yes.

The Court: Go ahead.

By Mr. Solovei:

Q. Mr. Harvey, you said that the Judge said, "Bring the defendants back"? A. Yes. He said, "Bring them back", and then he said, "No, let them stay there; let them stand where they are."

Q. If I told you that there is nothing in the printed record to indicate that, would you still say so? A. Oh, I am positive of it.

Q. Yes? A. Yes.

Q. You are positive of that? A. Yes.

Q. Now, Mr. Harvey, when these defendants were removed, they walked towards Part II, they walked towards the exhibit leading to the hall of Part II, is that correct? A. That is right—not to the hall—to the little corridor in back of the Judge's bench, not out to the front, the exit of the front.

Q. I mean— A. Like this one here. They go around the full courtroom through here.

Q. In any event, there is an exit beyond the jury box, which you come from behind the outside into the corridor, not the main corridor? A. A small corridor.

Q. Is that correct? A. Yes.

Q. Now, Mr. Harvey, isn't it possible that you are mistaken about this, in all fairness, as to where the defendants were? A. No, I am not because I was right there when he said, "Let them stay where they are."

Q. And I now again tell you that there is nothing in the record to show that the Judge even said anything like that, do you still say so? A. That may be.

Q. The record shows that the Judge said that the defendants are remanded? A. Exactly, he did say that.

Q. And the defendants were taken— A. The defendants got up.

The Court: There is nothing in the

record to show the defendants were taken anywhere.

Mr. Solovei: I am asking questions.

The Court: You are telling him that the record shows and that the record says they were taken physically.

Mr. Solovei: I am saying that the record shows that the defendants were remanded.

The Court: The record shows that the
4289 Court ordered that they be remanded.

Mr. Solovei: That is all.

Mr. Multer: Just one moment.

The Court: Yes.

By Mr. Multer:

Q. Mr. Harvey, in that courtroom, as in this courtroom, there are two jury boxes? A. Yes, sure.

Q. And the jury box in which the jury was seated throughout the trial and throughout the colloquy, that has just been referred to, was
4290 behind the Judge's left? A. That is right.

Q. And the jury box behind which the defendants were taken was on the Judge's right? A. That is right.

Q. You were sitting in that jury box during most of the trial? A. During most of the trial, yes; all of the trial.

Mr. Multer: That is all.

By the Court:

Q. The height of the jury box is a little over three feet, is that right? A. The jury box?

Q. Yes. A. That is about it.

Q. So that a person standing behind the jury box is in full view of the Court? A. Oh, yes, sure.

The Court: All right, step down. The Court has a distinct recollection itself. I asked the District Attorney and Mr. Harvey to step to the stand merely to see whether their recollection squares with that of the Court. The Court distinctly 4292
recalls that the Court said, "The defendants are remanded". The bailiffs then caused the defendants to rise. The bailiffs then started for the right of the courtroom, namely toward the extra jury box. The normal course of exit would have been to make another right turn at the end of the jury box and then proceed along a narrow passageway to the right door, adjacent to the Judge's bench, which leads to the "pen". My recollection is that when the Court Officers reached the 4293
corner of the jury box at or about that place, that the Court Officers looked toward the Court, that the Court either said, "Wait a moment", or words to that effect; or motioned with his right hand. The Court Officers then remained standing there, holding each of the defendants in custody, while the Court continued the colloquy with counsel in the presence of the jury. The jury at that time was on its feet. The Court's distinct recollection is that these three defendants and each of

them were all within the presence of the Court in the courtroom, within perfect view of everything that transpired, and certainly within hearing distance. The motion is denied with an exception to the defendants.

Mr. Multer: May I ask that I be permitted to call those that were there, for the purpose of the record?

The Court: I notice one of the Court
4295 Officers, who was there. Take the stand, Mr. Lehritter.

JOHN LEHRITTER, residing at 1384 Decatur Street, Brooklyn, New York City, called as a witness by the Court, being duly sworn by the Clerk, Mr. Caulfield, testified as follows:

By the Court:

4296 Q. You are a Court Officer attached to the County Court of Kings County? A. Yes, sir.

Q. And have been for a number of years? A. Yes, sir.

Q. And were such on the day when the trial terminated in Part II of this Court? A. Yes, sir.

Q. Were you present in the courtroom at the time when the Court questioned counsel as to the sending of exhibits to the jury? A. I was.

Q. Do you recall what transpired? A. I do.

Q. State in your own way what transpired. A. My recollection is the same as Mr. Harvey's.

Q. And state what it is. A. The Judge asked the question about the exhibits of the counsel that were in the case, and after the remand of the prisoners was ordered, however the prisoners had not left the courtroom but merely approached the end of the jury box on the left-hand side of the courtroom, which jury box was not the jury box the jury in the case were in.

Q. It was the spare jury box? A. Yes, sir.

Q. There is a jury box on one side of the courtroom, to the Judge's left? A. Yes. 4298

Q. Where the jury sits? A. Correct.

Q. And there is a spare jury box, that is usually vacant, to the right of the Court? A. Correct.

Q. Yes? A. And the colloquy ensued while the prisoners were standing in that aisle between the jury box and the wall proper leading to the exit of the courtroom on that side.

Q. Within full view of everything that transpired? A. Absolutely, because I was on the other side behind the jury box in which the jury in the case on trial were at.

Q. Were you the Officer waiting to lead the jury out of the courtroom? A. I was. 4299

The Court: Do you wish to ask any questions, Mr. Solovei?

By Mr. Solovei:

Q. You were there paying attention to your duties as an officer attached to the Court? A. I was there observing everything that was going on and I have a distinct recollection that that is the way I observed it.

Q. The three men were in the custody of the

Department of Correction, is that correct? A. Yes, sir.

Q. When the Judge said that the defendants are remanded, the gentlemen from the Department of Correction took those three men in custody, is that correct? A. They merely got up and proceeded—I distinctly remember that they awaited further instructions because immediately the colloquy ensued about the exhibits.

4301 The Court: I have no question in my mind about that, Mr. Solovei. There is not the shadow of a doubt in my mind about that. I even remember waving to the three bailiffs and they stopped right there in the corner of the jury box with the three defendants. Now whether the defendants had proceeded about a foot or two into the aisle of the jury box, or whether they stopped right at that corner, I do not recollect, but I do have a vivid and distinct recollection of one of them looking up at me, when this colloquy
4302 started, and I motioned with my hand or said, "Hold them", and they were held right in that corner until the entire proceeding terminated, and then they were removed from the room after it was all completed.

Mr. Solovei: You understand that we, who are practicing law and have a duty to perform, feel in a case of this character, where a man's life is at stake, we feel your Honor is honestly mistaken in what you said. We are honestly of the opinion and belief from our own observation that while the record in and of itself

was clear, we finally decided to make this motion so that there be no ambiguity about what transpired because a man's life is at stake. I assure your Honor there is not a lawyer that signed this affidavit, and your Honor knows them all personally, intimately well, including the former District Attorney of Kings County, that would make an affidavit and sign it and present it in a case of this character or any character, if they did not honestly believe that that transpired. 4304

The Court: I am mindful of the high caliber of the men to whom you refer. Certainly what you said about Mr. Geoghan applies to the others of course, and that is beyond question: but I have a very distinct recollection of the episode. I face the courtroom. I see what transpires. Everything that transpires in the well of the courtroom is within perfect view of the Court. I have no hesitancy in saying that both you and Mr. Geoghan and the other counsel are in error. I have a very 4305 vivid recollection of the entire proceeding. I have the utmost faith in the testimony of Mr. Harvey and the testimony of Mr. McGough, and the testimony of this sworn Court Officer. Now Mr. Litowitz is here. He is the Court Officer who is permanently stationed at the entrance door to the courtroom. The courtroom wherein this case was tried is much smaller than this one, as you will know. Whether Mr. Litowitz recollects what transpired or not, I don't know, but if you will step off, Mr. Lehritter, I will ask Mr. Litowitz to give us his recollection about the case.

4306 *Testimony of Herman Litowitz After Verdict*

HERMAN LITOWITZ, residing at 254 East 58th Street, Brooklyn, New York City, called as a witness by the Court, being duly sworn by the Clerk, Mr. Caulfield, testified as follows:

By the Court:

Q. You are a Court Officer attached to the County Court of Kings County? A. I am.

Q. And have been for a number of years? A. Yes, sir.

4307 Q. And you were such on the day when this case terminated, after the charge? A. Yes, sir.

Q. When there arose a question as to whether the exhibits should be sent to the jury room? A. Yes, sir.

Q. Have you any recollection of what transpired at that time with reference to the removal of the defendants? A. I recollect that the defendants were standing there behind the opposite jury box all through the discussion and that they left after the discussion was over.

Q. Have you heretofore been questioned by
4308 anybody concerning the transaction? A. No.

Q. By anybody at all, lawyer, or Court Official, or the Court itself? A. No, sir.

The Court: Do you wish to ask Mr. Litowitz any questions?

Mr. Solovei: No.

Mr. Multer: May I ask a question?

The Court: Surely.

By Mr. Multer:

Q. The discussion you are referring to is about the exhibits? A. About the exhibits.

Q. Do you recall that the jury was standing, that some of the jurors had already risen to their feet at the time that the discussion took place? A. I do not. My recollection is that they were all seated in the jury box.

Q. You did not see the jury get up and start to leave the jury box at any time? A. No.

Q. And then be recalled by the Judge and asked to resume their seats? A. No, sir.

Mr. Multer: That is all. 4310

The Court: Is there any other Court Officer that you desire to call?

Mr. Multer: No, I do not want to call any.

The Court: The Court finds that the defendants were in the courtroom within the presence and hearing of everything that transpired during the colloquy referred to. The motion is therefore denied with an exception to each of the defendants.

Mr. Solovei: May I, for the record, respectfully ask your Honor to permit me 4311 at this time, in view of the fact that your Honor called witnesses, to call all the lawyers involved in the case?

The Court: That is not necessary because I have the affidavits before me.

Mr. Solovei: I honestly think, your Honor, that your Honor is honestly mistaken.

The Court: You have your exception, Mr. Solovei. That disposes of that motion.

4312

Mr. Solovei: I will wait until the other motion is through and then I will make my other motion with reference to my defendant.

The Clerk of the Court: The People of the State of New York against Morris Malinsky, et al.; motion for an order of arrest of judgment, inspection of Grand Jury minutes, dismissing the indictment herein and to set aside the verdict.

4313

The Court: May I have the motion papers, please?

Mr. Morritt: Yes.

The Court: The motion of counsel will be granted in this respect,—

Mr. Morritt: Thank you.

The Court: If counsel deems the matter of importance to the defendants, counsel shall have the benefit of it; the defendants shall have the benefit of it.

Mr. McGough: Which motion is this?

The Court: This is the motion to incorporate into the record a statement as

4314

to what transpired when the witness Jalkover left the witness-stand.

Mr. McGough: That is not the motion.

The Court: That is the motion before me now. Perhaps I can simplify that. I will state on the record that the Court recollects, and I think it will be satisfactory to counsel, and if it is not, counsel will so inform the Court, that the witness Jalkover left the witness-stand and took his place among the spectators in the courtroom. The Court then summoned

Officer Litowitz. Officer Litowitz came on the bench and the Court whispered to him. The Court will put on the record what the Court said to Court Officer Herman Litowitz. The Court told Court Officer Herman Litowitz to tell the said Jalkover to remain in the body of the courtroom until recess, and not to immediately leave. The Court then observed Officer Litowitz leave the bench and proceed to where the witness Jalkover was seated in the body of the courtroom, and saw Court Officer Litowitz lean over and whisper something to the witness Jalkover, who nodded his head. The Court Officer then resumed his usual station at the entrance to the courtroom. Is that satisfactory? 4315 4316

Mr. Morritt: That is satisfactory. May I say that this all took place in the presence of the jury?

The Court: This all took place in the presence of the jury.

Mr. Morritt: With regard to the second motion. 4317

The Court: I do not say whether the jury could see what transpired because it was to the left of the jury, but whether it was or not, I am not prepared to say. It happened in the same room where the jury was sitting. Is that satisfactory, sir?

Mr. Morritt: That is satisfactory, except your Honor's statement whether the jury saw it or not.

The Court: I cannot state whether it

did or did not. Is there any other motion that you made?

Mr. Morritt: Yes, your Honor. Mr. Meadow has made an affidavit—

The Court: Who is making the motion, you or Mr. Meadow?

Mr. Morritt: We are all making it as counsel.

The Court: Who is going to argue the next motion?

4319 Mr. Morritt: If your Honor wants Mr. Meadow to argue it, it is all right with me.

The Court: Who is going to argue the next motion?

Mr. Morritt: I am prepared to argue the next motion.

The Court: Is it a motion in behalf of your client?

Mr. Morritt: Carabba and Meadow and Morritt.

The Court: Do you wish to argue it?

Mr. Morritt: Yes.

4320 The Court: Please give me a moment or two while I look at the motion papers.

Mr. Morritt: Yes, sir.

The Court: This motion is made in behalf of the defendant Rudish?

Mr. Morritt: Yes, sir. That motion was made continuously during the trial.

The Court: Just a moment; may I read it?

Mr. Morritt: I am sorry; yes, sir.

The Court: I should add, with regard to the motion concerning the witness

4321

Jalkover, that when the Court spoke to Officer Litowitz, that the jury could not possibly have heard what the Court said to him.

Mr. Morritt: I did not hear it either.

The Court: It was whispered to him.

Mr. Morritt: The record does not say that. I tried to be as fair as possible.

The Court: The record should be clear on that.

Mr. Morritt: There is no testimony 4322
that we heard what was said.

The Court: The motion which we are now hearing is a motion made in behalf of the defendant Rudish for an order of arrest of judgment, also for an order to inspect the Grand Jury minutes, and a further order dismissing the indictment herein, and for such other and further relief as to this Court may seem just and proper in the premises, and also for an order setting aside the verdict as being contrary to the weight of evidence. That 4323
is the motion as I have read it from the notice of motion.

Mr. Morritt: Yes.

The Court: There is no necessity of encumbering the record with legal argument. I have stated the motion on the record and therefore we will dispense with the legal argument.

Mr. Morritt: It is all right with me. That motion was made continuously throughout the trial.

4324 *Colloquy*

The Court: I will not hear legal argument.

Mr. Morritt: Anything I would like to say, I would like to have for the record, otherwise I would like to say nothing.

The Court: Legal argument—

Mr. Morritt: The case is replete with legal argument.

The Court: —is discretionary with the **Court,** whether legal argument should be
4325 made part of the record. I may hear legal argument informally.

Mr. Morritt: I shall be very brief.

The Court: That is not part of the record and I do not think it is necessary to incorporate it here.

Mr. Morritt: As a matter of fact, I have only one sentence.

The Court: All right.

Mr. Morritt: This motion was made throughout the trial in order to fully protect the defendant and make sure that a formal motion was made and made be-
4326 fore judgment was made. That is all I want to say, and the rest of the matter is in the moving affidavit which all counsel for this defendant Rudish are making.

The Court: Yes.

Mr. Morritt: As a matter of fact, the motion is made for the defendant Indovino, too.

The Court: You have nothing to do with that. You are making a motion now in behalf of the defendant Rudish.

Mr. Morritt: Yes.

The Court: All right. Do you desire to be heard on the motion, Mr. McGough?

Mr. McGough: No, your Honor, I have nothing to say with respect to this motion.

The Court: The motion is in all respects denied.

Mr. Morritt: I respectfully except.

The Court: Are these all the motions?

Mr. Multer: If your Honor pleases, in connection with the motion your Honor has already denied, the first motion which Mr. Solovei argued, and which was made on behalf of all the defendants, in view of the fact that there has been an issue raised as to what transpired, I think the defendants should be called and they be heard as to where they were at the time this happened. 4328

The Court: I have already decided that motion, but if you desire to have the defendants called, I will give you that opportunity. Call the defendants.

4329

JOSEPH INDOVINO, residing at 2118 Ocean Parkway, Brooklyn, New York City, called as a witness, being duly sworn by the Clerk, Mr. Caulfield, testified as follows:

By Mr. Multer:

Q. You are one of the defendants in this case? A. Yes, sir.

4330 *Testimony of Joseph Indovino After Verdict*

Q. Do you recall after your counsel had completed taking exceptions and making requests to the Court to charge to the jury, that something was said by the Court about remanding the defendants? A. Yes, sir.

Q. After that was said, what, if anything, was done, or what did you do with the other defendants or alone? A. A few seconds later, we were told to be remanded.

Q. Did you get up from your seat?

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The Court: Do not lead him.

Q. What did you do, sir? A. Well, we were standing up and he said, "Remand the prisoners". Then later he told them to stop.

By the Court:

Q. Who told you to stop? A. You told us.

Q. Told the Court Officer to stop? A. Yes, sir.

4332 By Mr. Multer:

Q. And then what happened? A. Then from there a few seconds later he told us—he told them to take us back.

By the Court:

Q. That is after the whole affair was finished with the jury? A. A few seconds.

Q. A few seconds thereafter? A. Not after the jury. First you stopped them and you told them to go ahead.

Q. After there was talk, I told them to go ahead? A. There was no procedure going on, not that I know of.

Q. But I told the Court Officers to stop? A. After you said to us to go ahead.

By Mr. Multer:

Q. After the Court said, "Go ahead," what did you do? A. We were brought upstairs.

Q. Taken out of the courtroom? A. Yes, sir. 4334

Q. The other defendants with you? A. Yes, sir.

Q. Did you hear any talk about exhibits? A. I don't remember hearing anything about exhibits.

Q. Did you stand for any length of time at or behind the jury box, and if so, how long? A. Never at any time.

Q. Do you recall the Judge saying—I withdraw that. When the Judge said to you or to the Officers to stop, and then you stopped as you say for a few seconds, did you see where the jury was? A. I believe they were standing 4335 up; they were in the box.

Q. Did you at any time before leaving the courtroom that day, see the jury resume their seats in the jury box? A. I cannot recall.

By the Court:

Q. What is your answer? A. I cannot recall.

The Court: Step down.

Mr. Multer: Just one question more.

The Court: I thought you were finished.

Mr. Multer: No, sir.

The Court: Go ahead.

4336 *Testimony of Sidney Rudish After Verdict*

By Mr. Multer:

Q. Did you hear the Court say anything to the jury about the Malinsky confession, after the Court had indicated that you and the other defendants should stop going from the courtroom? A. No, sir.

Mr. Multer: That is all.
The Court: Step down.
4337 Mr. Multer: Now, Mr. Rudish.

SIDNEY RUDISH, residing at 402 East 4th Street, New York City, called as a witness, being duly sworn by the Clerk, Mr. Caulfield, testified as follows.

By Mr. Multer:

Q. You were one of the defendants in this case? A. Yes, sir.

4338 Q. Do you recall what happened at the conclusion of the trial? A. Yes, sir, I do.

Q. Do you recall the Court saying that the defendants are remanded? A. Yes, sir.

Q. Tell us please everything that you heard and saw, after that statement was made by the Court. A. Well, the keepers there put the handcuffs on us and took us right around the jury box, and then Mr. Leibowitz here said, "Stop a minute".

Q. You mean Judge Leibowitz? A. He said, "Stop a minute", and we went right out.

Q. Did you hear anything said about exhibits? A. No.

Q. Did you see the jury get up on their feet or some of the jurors get up out of their seats? A. They were standing and we were standing there.

Q. Did you see any jurors resume their seats? A. No.

Q. Did you hear anything said by the Court to any of the jurors after the Judge had said "Stop"; did you hear the Judge at any time after that say anything to the jurors about the 4340
Malinsky confession? A. No, sir.

Mr. Multer: That is all. Mr. Malinsky.

MORRIS MALINSKY, residing at 714 Hinsdale Street, Brooklyn, New York City, called as a witness, being duly sworn by the Clerk, Mr. Caulfield, testified as follows:

By Mr. Multer: 4341

Q. You are the third defendant in this case? A. Yes, sir.

Q. Do you recall the Court directing the defendants to be remanded? A. Yes, sir.

Q. And this is the remand I am talking about, after the charge to the jury? A. Yes, sir.

Q. Will you tell us what you and the other defendants did at that time? A. The Officer that was with me said to me to get up. When I got up, the other two defendants got up and we just happened to walk around and his Honor

said, "Stop", and I seen the jury get up. Then he said, "All right, remanded", and we walked out.

Q. What was the order in which the three defendants were walking out? A. I walked first; Indovino in back of me, and Rudish in back of him.

Q. And after you heard the Court say, "The defendants are remanded", and then you were stopped, did you see the jurors resume their seats in the jury box? A. I do not recall that.

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Q. Did you hear the Judge say anything to the jurors about the exhibits? A. I don't remember that.

Q. Did you hear the Judge, after he told you to stop, did you hear the Judge say anything to the jurors about your confession? A. No, sir.

Mr. Multer: That is all.

The Court: All right, step down.

Mr. Multer: I have no further questions.

The Court: Are there any additional witnesses that you desire to call at this time?

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Mr. Multer: Of course, all the lawyers who made the affidavit are ready to take the stand.

The Court: And reiterate what is in the affidavit?

Mr. Multer: What they have said in the affidavit. There is possibly only one thing that is not in the affidavit and that is about the jury rising and resuming their seats and if there is any doubt about that—

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The Court: That is not of great importance in the decision I am about to make.

Mr. Multer: Except that I think if it agrees with your Honor's recollection—

The Court: My recollection is that they either all rose or some rose.

Mr. Multer: Yes, and then that you then asked them to resume their seats.

The Court: That is my recollection.

Mr. Multer: And then you told them about the Malinsky confession.

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The Court: That is my recollection. Take Mr. Solovei first. Swear the witness.

Mr. Morritt: I have been on my feet about two minutes.

The Court: I will hear you at the proper time. Swear Mr. Solovei.

4347

JOSEPH A. SOLOVEI, residing at 1363 President Street, Brooklyn, New York City, called as a witness by the Court, being duly sworn by the Clerk, Mr. Caulfield, testified as follows:

By the Court:

Q. You are counsel for the defendant Malinsky? A. Yes, sir.

Q. You were present when the alleged colloquy took place? A. Yes, sir.

4348 *Testimony of Abraham J. Multer After Verdict*

Q. Concerning the sending of the exhibits to the jury room? A. Yes, sir.

Q. You state in your affidavit that you actually observed the defendants leaving the courtroom? A. That is true, sir.

Q. Did you at any time ask the Court to terminate the proceedings and to have the defendants return to the courtroom? A. No, sir.

Q. Did you at any time make any objection in behalf of your client that the defendant was al-

4349 legedly removed from the courtroom? A. No.

The Court: Sit down, please. Next counsel.

ABRAHAM J. MULTER, residing at 1397 East 21st Street, Brooklyn, New York City, called as a witness by the Court, being duly sworn by the Clerk, Mr. Caulfield, testified as follows:

4350 By the Court:

Q. Mr. Multer, you are one of the attorneys for the defendant Indovino? A. Yes, sir.

Q. You were present when this colloquy transpired with reference to the sending of the exhibits to the jury room? A. Yes.

Q. You state in your affidavit that you saw the defendant Indovino actually removed from the courtroom while these proceedings were going on? A. Yes, sir.

Q. Did you at any time make any objection

in behalf of your client that he had been removed from the courtroom? A. I did not, sir.

Q. Did you at any time call it to the attention of the Court? A. I did not.

The Court: You may be seated. Mr. Morritt.

FRED G. MORRITT, residing at 650 Greene Avenue, Brooklyn, New York City, called as a witness by the Court, being duly sworn by the Clerk, Mr. Caulfield, testified as follows: 4352

By the Court:

Q. You are one of the counsel for the defendant Rudish? A. I am.

Q. And you were present at the time this incident took place? A. Yes, your Honor.

Q. You state in your affidavit that you actually saw your client removed from the courtroom? A. I did. 4353

Q. During the discussion? A. Yes, sir.

Q. Concerning the exhibits? A. Yes, sir.

Q. Did you at any time call it to the attention of the Court that your client had been removed? A. I did not.

Q. Did you at any time offer any objection? A. I did not.

Q. Did any of the other counsel offer any objection? A. I discussed it with one of them.

Q. Did any of the other counsel offer any

objection to the Court? A. Not to my knowledge.

The Court: All right, you may be seated.

Mr. Morritt: May I say something for the record?

The Court: You may be seated. That is all I am interested in. I just want you to be seated at this time.

Mr. Morritt: I am sorry.

The Court: Mr. Geoghan, please.

WILLIAM F. X. GEOGHAN, residing at 1842 Bedford Avenue, Brooklyn, New York City, called as a witness by the Court, being duly sworn by the Clerk, Mr. Caulfield, testified as follows:

By the Court:

Q. Mr. Geoghan, you were present during this incident? A. Yes, sir.

Q. Did you in behalf of your client, or any other counsel in behalf of any other client, call to the attention of the Court that the defendant that you represent or any of the other defendants had been removed from the courtroom? A. No, I did not.

Q. Or did you or any other counsel offer any objection to the Court? A. I think no counsel made objection.

The Court: Thank you, sir. Mr. Caraoba.

Testimony of Julian V. Carabba and Saul M. Meadow After Verdict 4357

JULIAN V. CARABBA, residing at 161—85th Street, Brooklyn, New York City, called as a witness by the Court, being duly sworn by the Clerk, Mr. Caulfield, testified as follows:

By the Court:

Q. Mr. Carabba, you were present during this proceeding that has been talked about? A. I was, Judge Leibowitz.

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Q. You were present during the whole of it? A. Yes, sir.

Q. Was any objection made by any counsel? A. There was not.

Q. Was the alleged removal of the defendants or any of them from the courtroom called to the attention of the Court by any counsel? A. There was not, Judge Leibowitz.

The Court: Thank you, sir. Mr. Meadow, please.

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SAUL M. MEADOW, residing at 251 Central Park West, New York City, called as a witness by the Court, being duly sworn by the Clerk, Mr. Caulfield, testified as follows:

By the Court:

Q. You were present during this episode? A. Yes, sir.

Q. Were you present during the whole of it? A. Yes, your Honor.

4360 Q. Now was any objection made by any counsel? A. I did not hear any.

Q. With reference to their clients? A. No.

Q. Did you make any objection? A. I made no objection.

Q. Did you call it to the attention of the Court that the defendants or any of them had been removed from the courtroom? A. No.

The Court: Thank you, sir. Mr. Longo, please.

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MICHAEL F. LONGO, residing at 45 Martense Street, Brooklyn, New York City, called as a witness by the Court, being duly sworn by the Clerk, Mr. Caulfield, testified as follows:

By the Court:

Q. Mr. Longo, you were present during the episode referred to? A. Yes.

4362 Q. And during the whole of it? A. Yes, sir.

Q. Was any objection made either by you or any other counsel? A. There was not.

Q. Concerning the alleged removal of the defendants or either of them from the courtroom? A. There was not.

Q. Was anything called to the attention of the Court? A. No.

The Court: Thank you, Mr. Longo. Now, sir, what do you desire to offer?

Mr. Morritt: I desire to add testimony

to the testimony that has been given, which was not asked. Your Honor has asked—

The Court: I have your affidavit, sir.

Mr. Morritt: There is more to it. I did not expect that there would be a hearing on the voir dire this morning. I should like to add certain things.

The Court: You may add whatever you choose.

Mr. Morritt: In response to the Court's 4364
question, this is the first time I ever participated in a Kings County murder case and I did not realize and I wish to state I was inexperienced and did not know whether it was important or not. As a matter of fact, I have my own records here.

The Court: I do not desire to hear anything of that kind, about your records.

Mr. Morritt: To refresh my recollection.

The Court: I do not desire to hear 4365
anything about that, which is by way of volunteering the same without better proof.

Mr. Morritt: This is my own personal knowledge.

The Court: You may tell me what you have there.

Mr. Morritt: According to my notes, made at the time I was in the courtroom, I observe the notation, what I said in my affidavit, that the jury got the case at

5:33; when the jury left it was about 5:40; that this incident took place in about seven minutes, and I swear that I saw the defendants leave the courtroom to the best of my recollection. I did not see them in the courtroom at that time and at that time I did not know the significance and importance of it. It is like the Jaikover incident. I observed that and the Court granted the motion, but I am swearing that to the best of my recollection, and I want the Court to know I did not say anything at the time, and I frankly admit it was due to inexperience, too.

The Court: My thought in the matter is that the Court should not assign inexperienced counsel where a man's life is at stake.

Mr. Morritt: I agree with you, your Honor.

The Court: This is not a laboratory for people charged with murder.

Mr. Morritt: Your Honor must have had his first murder case at one time.

The Court: However, the defendant that you represent was most ably defended. I will say that for the record, so that none of his rights were lost. In fact, they were more than amply protected by associate counsel. That disposes of all the motions, gentlemen.

Mr. Geoghan: In behalf of Indovino, there was no motion made at the conclusion of the trial. It was to be reserved

until today. I move to set aside the verdict.

The Court: Mr. Geoghan, we will take them up in the order of the indictment.

Mr. Multer: We have a pending motion.

The Court: That motion is in all respects denied. Let the record show that the Court has taken into consideration all the testimony that has been adduced here 4370
on the motion made by Mr. Solovei, concerning the episode about the exhibits in the presence of the defendants in the courtroom. These have been all taken into consideration; and that upon all the testimony adduced, including that offered by Mr. Morritt, the Court denies the motions for the reasons stated.

Mr. Multer: Exception to each of the defendants.

The Court: With an exception to each of the defendants. The Court will now hear Mr. Solovei on the motion to set 4371
aside the verdict of the jury. The argument need not be taken.

Mr. Solovei: I am not going to argue the motion. I will give you what my motion is on behalf of the defendant Malinsky. I move to set aside the verdict of conviction and for an arrest of judgment, and the finding by the jury of the defendant Morris Malinsky guilty of the crime of murder in the first degree, as alleged in the indictment, on the following grounds: first, that the verdict of the jury finding

4372 *Motion to Set Aside Verdict Against Defendant Malinsky*

the defendant Morris Malinsky guilty of the crime of murder in the first degree was contrary to law, contrary to the evidence, against the weight of evidence, and all the objections, exceptions, and motions made during the trial; second, that the defendant was deprived of his constitutional rights in violation of Article I, Section 6, of the State Constitution, and
4373 that by reason thereof the defendant Morris Malinsky is being deprived of his life and liberty without due process of law; third, that the evidence was admitted during the course of the trial which deprives the defendant Morris Malinsky of due process of law in violation of the Fourteenth Amendment of the United States Constitution; fourth, that the Court in admitting the confession in evidence deprived the defendant Morris Malinsky of due process of law in violation of the Fourteenth Amendment of the United
4374 States Constitution; fifth, I feel it necessary to make it for the record and because your Honor will in all probabilities deny them all, that the Court in instructing the jury in reference to that alleged confession at the close of the entire case, in the absence of the defendants, was a violation of Section 427 of the Code of Criminal Procedure and Section 465 of the Code of Criminal Procedure, Subdivision 1, depriving the defendant Morris Malinsky of due process of law in violation of Article I, Section 6 of the State Constitution, and also depriving the defendant of

due process of law in violation of the Fourteenth Amendment of the United States Constitution; sixth, that the defendant Morris Malinsky was deprived of due process of law in violation of Article I, Section 6 of the State Constitution and of the Fourteenth Amendment of the United States Constitution by reason of the fact that the arresting officers failed to arraign the defendant Morris Malin- 4376
sky at the time of his arrest before a Magistrate having jurisdiction to take his examination in violation of Section 165 of the Code of Criminal Procedure, and also in violation of Section 1841 and 1844 of the Penal Law of the State of New York; seventh, that the Court's charge to the jury deprived the defendant Morris Malinsky of due process of law in violation of Article I, Section 6, of the State Constitution, and due process of law in violation of the Fourteenth Amendment of the United States Constitution. 4377

The Court: Motion denied.

Mr. Solovei: Exception.

The Court: I will now hear counsel for the defendant Rudish.

Mr. Morritt: May it please the Court, I respectfully move on behalf of the defendant Rudish with the same force and effect as if I made that myself, all the objections, exceptions taken by Mr. Solovei, with of course the question—

The Court: I do not understand any of that. Make your motion as if you are

4378 *Motion to Set Aside Verdict Against Defendant Rudish*

making it for your client without recourse to whatever any other counsel has said.

Mr. Morritt: On behalf of the defendant Rudish, I move to vacate and set aside the verdict on the grounds: 1, that the judgment of conviction was contrary to law, contrary to the evidence and against the weight of the evidence and upon all the objections, exceptions and motions
4379 made during the trial; 2, that the defendant was deprived of his constitutional rights in violation of Article I, Section 6 of the State Constitution, and by reason thereof defendant being deprived of his life and liberty without due process of law; 3, that evidence was admitted during the course of the trial which deprived the defendant Rudish of due process of law in violation of the Fourteenth Amendment of the United States Constitution; 4, that the Court committed error in the treatment of evidence that was both re-
4380 ceived and excluded; 5, that the Court's charge to the jury deprived the defendant Rudish of due process of law in violation of Article I, Section 6, of the State Constitution, and due process of law in violation of the Fourteenth Amendment of the United States Constitution.

The Court: What does Article I provide that you have just quoted to the Court?

Mr. Morritt: Article I is part of the Bill of Rights.

The Court: What does it provide?

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What does that particular article that you have just mentioned provide?

Mr. Morritt: Does your Honor know Section 259 of the Code?

The Court: I am asking you to please guide the Court. You just made a motion to set aside the verdict of guilty under a certain article. Tell the Court what that article provides. Do you know?

Mr. Morritt: I certainly know as well as your Honor. I say it most respectfully.

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The Court: Tell the Court so I may be guided. Do you know what the article provides, Yes or No?

Mr. Morritt: At this time I cannot recall. The Fourteenth Amendment—

The Court: Not the Fourteenth Amendment; the other one.

Mr. Morritt: I can say to your Honor, what is 259 of the Code of Criminal Procedure. You cannot ask me a catch-as-catch-can question.

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The Court: Are you finished?

Mr. Morritt: I am not finished.

The Court: Go ahead.

Mr. Morritt: I think your Honor's question was insulting.

The Court: Sit down.

Mr. Morritt: I refuse to go ahead at this time.

The Court: Does either or both of other counsel desire to add to the motion so that the defendants' rights may be properly protected?

4384 *Colloquy*

Mr. Meadow: I move at this time on behalf of the defendant Rudish to set aside the indictment as being faulty, filed contrary to the laws of the Code of Criminal Procedure and the Penal Law of the State of New York. I move further to set aside the verdict as being contrary to the weight of credible, reliable and believable testimony, and as a matter of law the defendant was not proved beyond a
4385 reasonable doubt guilty. I move further that the verdict be set aside on the ground that Spielfogel was an accomplice.

The Court: You mean, Mr. Meadow, as a matter of law?

Mr. Meadow: Yes, as a matter of law; and I move more specifically to dismiss the indictment on the ground that it was found on incompetent, irrelevant and immaterial matters.

The Court: Motion denied, with an exception to the defendant. Mr. Carabba, do you desire to add anything?

4386 Mr. Carabba: My colleague just made the last motion and I wish it noted on the record more specifically,—may I add with the Court's permission, the trial record discloses that at the end of the prosecution's case in so far as the defendant Rudish is concerned, that the evidence adduced by the prosecution as part of the People's case, all the evidence in so far as it applies to the defendant Rudish, was insufficient to warrant the finding of an indictment by the Grand Jury of this

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County for murder in the first degree as against the defendant Rudish. That is my motion.

The Court: Your motion is denied.

Mr. Carabba: I think your Honor ruled on the question of the evidence that was adduced before the Grand Jury. My recollection is that your Honor did rule on that motion during the course of the trial. We asked that your Honor read the evidence of the Grand Jury and I think your Honor ruled on that.

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The Court: I have already ruled on that.

Mr. Carabba: That is all I have to say.

The Court: All right, Mr. Geoghan.

Mr. Geoghan: Mr. Multer will argue the motion.

Mr. Multer: If your Honor pleases, on behalf of the defendant Indovino, we move to set aside and vacate the verdict of conviction on the ground that it was contrary to law, contrary to the evidence, against the weight of the evidence, and upon all the objections, exceptions and motions made on his behalf during the trial; and that the defendant Indovino was deprived of his constitutional rights in violation of the Federal and State Constitutions, against deprivation of life and liberty without due process of law; and that the Court's charge to the jury deprived the defendant Indovino of the safeguards given to him by the Federal and State Constitutions against violation of his

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rights, and deprivation of his life and liberty without due process of law. And we move to set aside the verdict on the following grounds, to-wit, that the indictment was based upon illegal, incompetent evidence and insufficient evidence; and that the indictment under which he stood trial was illegal, and that any verdict based upon any proof adduced in support of such an indictment must therefore be set aside,

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and that of course is in addition to the grounds for setting aside the verdict, that the verdict itself is based upon illegal, incompetent and incredible testimony. And we also urge the additional ground that the proof as submitted to this Court and jury was in variance with the indictment and in variance with the District Attorney's opening at the trial, and for all of those reasons, the defendant Indovino asks that this verdict be set aside and that he be granted a new trial, and that the indictment be dismissed.

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The Court: Motion denied.

Mr. Multer: I have assumed that your Honor has already indicated that the Grand Jury minutes would be made part of this record, and therefore I did not make the motion again to have—

The Court: I have not indicated definitely whether that would be so or not.

Mr Multer: Then on behalf of the defendant Indovino—

The Court: I will do this; after judgment is imposed, I will then take under

consideration whether or not to make the minutes part of the record, and if counsel so desires, counsel may make a motion in reference to the record at that time.

Mr. Multer: Of course, we make the motion at this time before the imposition of this sentence, that the Grand Jury minutes be added to and considered part of this record for the purpose of our motion to dismiss the indictment on the ground that it is insufficient and illegal. 4394

The Court: For the present, your motion is denied.

Mr. Multer: Exception.

The Court: With leave to renew your motion later.

Mr. Meadow: I also want to join in that motion in behalf of the defendant Rudish to set aside the verdict.

The Court: That motion has already been made to set aside the verdict. We cannot let this thing go on indefinitely. Make your motion and be finished with it. 4395

Mr. Meadow: I will be finished with it then. I move to set aside the verdict on the ground that the proof adduced is at variance with the opening statement of the District Attorney, and on the further ground that the minutes of the Grand Jury be made a part of the minutes and record of this case.

The Court: Motion denied.

Mr. Meadow: Exception.

(Discussion off the record.)

The Court: The sentence as to the de-

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fendant Indovino is postponed to next week.

(The defendant Indovino was remanded.)

The Court: Morris Malinsky to the bar.

(The defendant Morris Malinsky approached the bar.)

The Clerk of the Court: If you have any legal cause to show why the judgment
4397 of the law should not be pronounced upon you, say it now and address yourself to the Court.

Mr. Solovei: I have already made all my motions.

The Court: Do you move for judgment, Mr. District Attorney?

Mr. McGough: The District Attorney at this time asks that judgment be imposed and sentence be imposed.

The Court: Morris Malinsky, you have been convicted of the crime of murder in the first degree by a verdict of the jury.
4398 The sentence of the Court is that you, Morris Malinsky, for the murder in the first degree of one Leon Fox whereof you have been convicted, as the Court said, be and you are hereby sentenced to the punishment of death. AND IT IS ORDERED AND ADJUDGED AND DECREED that within ten days after this day's session of the Court the Department of Correction of the City of New York is to deliver you, Morris Malinsky, together with the warrant of this Court, to the agent and warden of Sing Sing State Prison at Ossining, New

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York, where you shall be kept in solitary confinement until the week beginning Sunday, August 29, 1943, and upon some day within the week so appointed the agent and warden of Sing Sing State Prison at Ossining is commanded to do execution upon you in the mode and manner prescribed by the laws of the State of New York; and SO ORDERED. The defendant is remanded.

(The defendant Morris Malinsky leaves the courtroom.) 4400

The Court: Sidney Rudish.

The Clerk of the Court: If you have any legal cause to show why the judgment of the law should not be pronounced upon you, say it now and address yourself to the Court.

Defendant Rudish: I am innocent. I was framed. That is what I got to say.

Mr. Meadow: We have made various motions.

The Court: Is that all you care to say, Rudish? 4401

Defendant Rudish: That is all I care to say. I have got nothing to do with this case; nothing whatsoever.

The Court: Is there anything counsel want to say?

Mr. Carabba: We have made our motions, Judge.

The Court: Of course, the sentence is mandatory, as you understand.

Mr. Carabba: I understand that.

The Court: Sidney Rudish, you have been convicted of the crime of murder in

4402 the first degree by a verdict of the jury. The sentence of the Court is that you, Sidney Rudish, for the murder in the first degree of one Leon Fox, whereof you have been convicted, as the Court said, be and you are hereby sentenced to the punishment of death. AND IT IS ORDERED AND ADJUDGED AND DECREED that within ten days after this day's session of the Court the Department of Correction of the City
4403 of New York is to deliver you, Sidney Rudish, together with the warrant of this Court, to the agent and warden of Sing Sing State Prison at Ossining, New York, where you shall be kept in solitary confinement until the week beginning Sunday, August 29, 1943, and upon some day within the week so appointed the agent and warden of Sing Sing State Prison at Ossining is commanded to do execution upon you in the mode and manner prescribed by the laws of the State of New York; and so ORDERED. The defendant is
4404 remanded.

(The defendant Sidney Rudish leaves the courtroom.)

Mr. Carabba: I understand after the judgment was imposed, your Honor would consider the motion that the Grand Jury minutes be made part of the record. May I make such a moti n now?

The Court: Suppose you make such a motion with notice to the District Attorney.

Mr. Carabba: In writing?

The Court: And I wili hear it at that

time. In other words, I denied the motion already made with leave to be renewed. The reason is that I want to give it some further consideration.

Mr. Carabba: We will obey your Honor's direction.

(The defendant Sidney Rudish was brought before the bar.)

By the Court (to the defendant Rudish):

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Q. Who is your lawyer at the present time, Rudish? A. Mr. Meadow was assigned.

Q. Mr. Meadow? A. Yes.

Q. And Mr. Carabba? A. Mr. Carabba and Mr. Morritt.

Q. Have you retained any other lawyers? A. No.

Q. Has anybody in your behalf retained any lawyer to act for you? A. No, sir.

Q. Do you desire to have the Court assign a lawyer or lawyers for you at the State's expense? A. I thought the lawyers were assigned.

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Q. I beg pardon? A. I thought the lawyers were assigned.

Q. They were assigned throughout the trial, and the lawyers will continue; the lawyers that you had, unless the Court changes the lawyers which I believe the Court has the power to do and which the Court will do with reference to one of the lawyers anyhow. A. That leaves me in a muddle.

The Court: And the Court may substitute in place of an attorney that the Court proposes to

eliminate, an attorney well versed in appeal work.

Mr. Morritt: I think the defendant should know which of the attorneys you intend to eliminate.

The Court: The Court will exercise its own discretion. The defendant does not choose his lawyers. This man has just been sentenced to the electric chair. He is entitled to the best talents that this Court can give him, and the Court would feel that it was not carrying out its sworn duty if it permitted any incompetent to represent him.

4409

Mr. Morritt: I am just telling the defendant—

The Court: You can tell the defendant—

Mr. Morritt: You tell the Judge what your personal heart is in this case.

Defendant Rudish: I would like to know who you will eliminate.

The Court: I am not prepared to tell you at this time, sir. The Court has the exclusive power to assign counsel. The defendant may not and cannot dictate to the Court what counsel will be assigned but the Court will say this to you, that the Court will assign the best counsel that the Court knows of; at least, a counsel fully capable of aiding two of the other counsel in prosecuting this appeal, if that becomes necessary, although I have the utmost confidence in both Mr. Carabba and Mr. Meadow as very capable and efficient lawyers.

4410

Defendant Rudish: I take it you do not want Mr. Morritt.

The Court: That is up to me, sir. You may

retain whatever lawyer you desire. You have that constitutional right.

Defendant Rudish: I haven't the funds to hire a lawyer.

The Court: If you have no funds with which to hire an attorney, the Court will be happy to have counsel assigned for you.

Defendant Rudish: I would like to have a little time.

Mr. Carabba: I think this is the lowest procedure I have seen in all my life in a courtroom. 4412

The Court: What procedure do you mean?

Mr. Carabba: The conduct of one of counsel before the Court, after the Court has made such a decisive clean statement of the law. I understand Mr. Morritt said in open court that he had been retained by the family, and then the defendant said here he had no funds and no such knowledge.

Mr. Morritt: The defendant did not say that at all. The defendant's father and sister and wife were up in my office, and the defendant called me at the Raymond Street Jail. 4413

The Court: Those poor people; I don't know what they know about this whole matter.

Mr. Morritt: I did not solicit them. Your Honor will recall that you brought it up about counsel after that. Your Honor may have your own opinion about me and I respect it but that does not make your Honor right.

The Court: I think the least you say about it is better because there are newspaper reporters here.

Mr. Morritt: I welcome the newspaper reporters here.

4414 *Colloquy*

The Court: Please say nothing. (to defendant Rudish) Rudish, what do you desire to do? Do you desire the Court to see that assigned counsel take care of you or do you desire to retain your own attorney?

Defendant Rudish: I have not the funds to maintain my own attorney.

The Court: Then the Court will assign counsel.

Defendant Rudish: Can I maintain the same
4415 counsel I have now?

The Court: The Court will determine that.

Defendant Rudish: That leaves me in the same place. I still want to retain all three lawyers.

The Court: They are assigned counsel and the Court will amend the order assigning counsel by striking from it the name of one of the counsel.

Defendant Rudish: I will take Mr. Meadow and Mr. Morritt.

The Court: Do you desire assigned counsel or
4416 do you wish to retain your own counsel, sir?

Defendant Rudish: Assigned counsel.

The Court: All right, the defendant is remanded, and the Court will assign proper counsel.

Defendant Rudish: Can I retain Mr. Morritt?

The Court: The defendant is remanded.

4417

People's Exhibits 1 to 16 inclusive

The printing of these exhibits is omitted pursuant to stipulation on page 1474 of this record.

Defendants' Exhibits 1 and 2

The printing of these exhibits is omitted pursuant to stipulation on page 1474 of this record.

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Stipulation as to Exhibits

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

4421

MORRIS MALINSKI,
SIDNEY RUDISH,
Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties that the originals of the following exhibits received upon the trial herein may be produced, used and referred to on the argument of the
4422 appeals herein with the same force and effect as if reproduced in the Case on Appeal and that the reproduction of the same may be dispensed with:

PEOPLE'S EXHIBITS

1. .38 calibre bullet.

2. Map of Surf Avenue and West 12th Street.

3. Photograph of automobile facing south.

Stipulation as to Exhibits 4423

4. Photograph of Surf Avenue and West 12th Street, looking south.

5. Photograph of West 12th Street, looking north.

6. Photograph of West 12th Street at point where deceased was shot.

7. Photograph of No. 1844 Stilwell Avenue.

8. Photograph of Stilwell Avenue, looking south. 4424

9. Photograph of Stilwell Avenue, looking north.

10. Photograph of rear of automobile.

11. Bullet hole in right front fender of automobile.

12. Photograph of No. 231 East 10th Street.

13. Statement of defendant Malinski. 4425

14. Hat found under automobile.

15. Police photograph of Harry Levine.

16. Photograph of Beitler.

4426 *Stipulation as to Exhibits*

DEFENDANTS' EXHIBITS

1. Wedding invitation.

2. Identification card of place where Malinski worked.

Dated, Brooklyn, N. Y., October 29, 1943.

THOMAS CRADOCK HUGHES,
Acting District Attorney, Kings
4427 County, Attorney for Plaintiffs.

JOSEPH A. SOLOVEI,
DAVID F. PRICE,
Attorneys for Defendant, Morris Malinski.

JOHN J. FITZGERALD,
JULIAN V. CARABBA,
SAUL N. MEADOW,
Attorneys for Defendant, Sidney Rudish.

4428

4129

Clerk's Certificate

State of New York }
County of Kings } ss.:

I, Francis J. Sinnott, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County, do hereby certify that the foregoing consists of true copies of the notices of appeal and of the judgment roll in the case of The People of the State of New York against Morris Malinski and Sidney Rudish, convicted of the crime of Murder 4130
in the First Degree, and that the same have been compard by me with the originals and are correct transcripts therefrom, and of the whole of such originals.

Given under my hand and attested by the seal of the said Court this 8th day of November, in the year of our Lord one thousand nine hundred and forty-three.

Francis J. Sinnott,
(Seal) Clerk. 4431

[fols. 1479-1482] IN COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

v.

MORRIS MALINSKI and SIDNEY RUDISH, Appellants

Argued January 17, 1944; decided April 20, 1944

[fol. 1483] OPINION

CONWAY, J.

The two defendants and one Joseph Indovino were convicted of the crime of murder in the first degree. As to Indovino, the jury recommended life imprisonment and his case is not now before us.

The deceased, Leon Fox, was a police officer of the city of New York who was accompanying the manager of a theater to a branch bank in Coney Island so that the receipts of the day might be deposited in the bank receptacle provided for that purpose. The tragedy occurred at about 11 o'clock at night and, since the date was February 15, 1941, and the scene on Surf Avenue in Coney Island, there was practically no one abroad. As the police officer and the manager proceeded toward the bank they neared an automobile which was parked on one of the streets running at right angles to and facing Surf Avenue. One door was open and the front lights had been extinguished. As they passed it, a man jumped from the car, knocked the manager down and shot the officer. The manager dropped the bag upon command, after attempting to run with it. It was picked up and the automobile drove off. The police officer fired some six shots after the departing automobile as he lay upon the sidewalk. None of the robbers was identified by anyone. Those within the neighborhood testified to the speed and the quick departure of the automobile. One witness did say that he heard in all five or seven shots; that an automobile shot past; that there were three men in it; that the two men in front were short men; that the driver looked as if he could not reach the pedals of the car; that the man in the rear of the car was thin with hair slicked back and that he was bent over.

Ten months passed.

In December of the year of the murder two men were sentenced to a State prison for robbery committed while armed. One of them was David Yellin. He received a sentence of from ten to twenty years. The other, committed three days later in connection with the same crime, was Nathan Spielfogel. He received a sentence for from thirty to sixty [fol. 1484] years. Spielfogel was the intimate of the defendant Malinski. He was married. As an outgrowth of his intimacy with Malinski and of their criminality together, he and Malinski had agreed that if one went to prison the other would contribute to the support of the family of the one incarcerated. Malinski broke that agreement after partial performance of it.

At the State's prison at Sing Sing Spielfogel ate with a convict named Kovner. Kovner had never known Spielfogel or Yellin before meeting them in Sing Sing. He was intimate, however, with Malinski and Indovino and his close companion was one Ebbie Beitler. Kovner testified that whenever Beitler was in the city the two of them were inseparable. We shall return to Beitler later. Suffice it to say at this point that it was Beitler who gave the signal which led to the shooting of Fox and that Kovner had been with Beitler when the latter was subsequently engaged in an affray in a New York hotel in which Beitler shot one man, attempted to shoot a policeman and then committed suicide. That had occurred on October 28, 1941, and it was thereafter that Kovner was sent to Sing Sing and became one of the trio composed of Yellin, Spielfogel and Kovner.

That was the setting as we approach the end of the second ten-month period succeeding the murder of Fox.

On October 23, 1942, in the early morning, the defendant Malinski was arrested and brought to a leading hotel in Brooklyn and lodged in a room there. Spielfogel was brought to the same hotel. On the following day the defendant Rudish and Indovino were arrested and brought to the hotel. On that same day David Yellin was brought there from Sing Sing prison. Thereafter Malinski, Rudish and Indovino were indicted and put upon trial.

On that trial David Yellin, testifying as a witness, said that on the Tuesday or Wednesday preceding the day of the murder he met Indovino on First Street and Avenue A in Manhattan. He said that Beitler called to him, introduced him to Indovino and asked him to take a message to

Spielfogel. The message was that Indovino, the finger man, had a "cinch job" (crime) which could be done at Coney Island and which involved the manager of a theater who [fol. 1485] took the receipts of the theater to a bank in a neighborhood where there was no one about. When they had finished talking Beitler told the witness to see Spielfogel and tell him that he (Beitler) wished him to join in the commission of the crime and to give to Spielfogel the details. It was there stated that the receipts should total about $1,000. As a matter of fact that estimate was but $230 too high. Indovino stated that he would not go himself because he was too well known in Coney Island. Yellin carried the message that night to Spielfogel but the latter said that he would not take part in anything in which Indovino was concerned. We shall return to the testimony of Yellin later but shall now proceed chronologically with the testimony of others.

Nathan Spielfogel, whose nickname was Slip, testified for the People that Yellin had brought to him Beitler's message and that he was not interested so long as the crime had been suggested by Indovino. He said that Beitler met him the next day and that he again told Beitler that he didn't wish to join with him. He said that Beitler then asked if it was all right to use the "pieces" (guns). Spielfogel testified that he told Beitler that he would have to ask Malinski. He testified, "I says, 'Those "pieces" don't belong to me'. I told him, 'Malinski—it is up to Malinski. If he wants to give you them, they are yours. I got no part of them "pieces"; they are all Malinski's.' * * * I said, 'Those "pieces" don't belong to me. They are all Malinski's "pieces". If he gives them to you, you got them.'" Beitler was interested because the "pieces" were large ones. Apparently there were then seven guns at the store in which Malinski worked. Spielfogel testified that on the following Saturday he had four guns in his possession and put them in the store but again denied that they were his.

Then occurred the robbery and murder, to the circumstances of which reference has already been made. Following it and at about 1:30 a. m. on the morning of February 16th, Malinski arrived at Spielfogel's home without hat or coat. He said he had left his coat at the club but that he had dropped his hat—Hershee's hat—when he jumped from the automobile when abandoning it. Hershee was one Harry Levine who had given Malinski a hat. A hat

had been found under the automobile used in the robbery which had been abandoned on Stillwell Avenue about a block [fol. 1486] and a half from Surf Avenue. The hat so found, later init-aled by Malinski during a confession to which reference will be made, fitted Malinski when he was required to put it on while testifying or the jury could so have found.

Spielfogel said that after he provided Malinski with another hat, they went to the Citadel Club where Malinski talked over the crime which had been committed. He said that he met the defendant Rudish in Manhattan at about 9 o'clock and that they picked up Beitler on Houston Street and then drove to Coney Island. They visited a restaurant and then placed the automobile in position near the bank. Beitler stayed on the corner and gave Malinski a signal when the manager and the police officer were approaching. The shooting then occurred. They abandoned the automobile after going a few blocks and Beitler and Malinski took first one cab and then another back to Manhattan. Beitler then told Malinski to go to the club with the money while he went to the store of his aunt and disposed of the guns which had been used. Rudish was to come by train and when all three finally arrived at the club the money was divided. There was a dispute there, at the time of the division of the money, as to the conduct of the robbery, Malinski insisting to Spielfogel that he had done all that he was supposed to do as planned beforehand; that Beitler was supposed to take the money while he (Malinski) "took the cop", whereas Rudish and Beitler were insisting that it had been arranged for Malinski to take the money.

In the course of that conversation as detailed by Spielfogel from the witness stand, Malinski said that he had used the "pieces" which Red Tiplet had taken from a locker uptown and he identified them as two .38 calibre pistols and two of .45 calibre and that he and Beitler had each fired two shots. Digressing for a moment and bearing in mind that this story was told by Spielfogel in October of 1942 (he was brought to the city from Sing Sing on October 15, 1942), nearly twenty months after the commission of the crime, it is interesting to note that the District Attorney brought to the trial one Simon Eisler who, at the time of the trial, was a corporal in the United States Army stationed at Tacoma in the State of Washington and who had never

been convicted of any crime nor charged with any crime. [fol. 1487] The testimony of that man as distinguished from that of the convicts who gave testimony against Malinski undoubtedly had great weight with the jury and was very damaging to Malinski. Eisler's nickname was Red Tiplet (a red pigeon). When he gave his testimony he had been in the Army since January 20, 1941, a period of about two and one half years. He entered the Army therefore about twenty-five days before the murder. He had known the defendant Rudish for fifteen years and the defendant Malinski for about three years. He testified that in the latter part of December, 1940, he had a talk with Malinski at the Citadel Club and that Malinski gave him a ticket to pick up a package in the Terminal and to bring it down to the club. Malinski gave him four dollars and he went uptown, picked the package up and brought it back to the club. Malinski opened it and in the package he saw four pistols: two fountain pen guns and two pistols of .38 calibre. The two .38 calibre pistols were wrapped in stockings. He was asked: "Q. In addition to the fountain pen guns and the two .38's, did you see any other object in the package? A. There were more stockings, but I don't know what was in them." The corporal said that when he obtained the package he had not known what was in it. He also said that he did not know the defendant Indovina. He had known Yellin all his life and he knew Spielfogel and had gone to school with Beitler. At the time of the errand, he lived on the east side of Manhattan about half a block away from the Citadel Club. Curiously enough the witness had never told Spielfogel nor Yellin nor any police officer about the errand on which Malinski had sent him until he was brought from Tacoma on June 12, 1943, a distance of 3,000 miles, five days before he testified on June 17, 1943. It would seem clear that the information as to Eisler could only have come to the District Attorney from Malinski through Spielfogel to Yellin or Kovner in Sing Sing.

We now return to Malinski and Spielfogel at the Citadel Club in those early morning hours after the murder. After leaving the club they went to a restaurant and then to the store where Malinski worked. There the latter left the change in silver which had been taken in the robbery. Then they went to the home of a sister of Malinski where

he wished to stay rather than to return to Brooklyn for fear [fol. 1488] his parole officer might appear. Spielfogel testified that he went in the kitchen of that apartment, took a drink of water and walked back into the hall. A few minutes later he heard Malinski say, "Go back to bed." The two separated at about 4 o'clock that morning.

Again despite the lapse of twenty months as already indicated, the People put upon the stand the brother-in-law of Malinski and the girl in whom Malinski was interested and who was living at that time with Malinski's sister and her husband. Malinski's brother-in-law, Pietro Di Pisa, testified that Malinski came to his home about 1:30 or 2 o'clock in the morning of Sunday, February 16, 1941; that Malinski said he had shot a cop in Coney Island and that he had $200 in his pocket; that Malinski talked to the young girl, Jean Goonan, in the kitchen and that he heard Malinski say to her, "If you don't go back to bed there I give you the same dose as I give the cop." Di Pisa said that he ordered Malinski out. Malinski's sister did not testify in denial of any of this. Di Pisa said that he had not talked with anyone from the police department or from the District Attorney's office until the Tuesday preceding the day on which he testified.

Jean Goonan testified that she was living with the Di Pisas; that on Sunday morning at about 2:30 she was awakened by a banging on the door and that Malinski came in. She heard him tell his sister that he had shot a cop and that they had obtained about $200 each as a result; that she asked him, "What did you do; shoot a cop?" and that Malinski said, "Get back in bed before I give you the same thing I gave the cop."

We take now the case against Rudish. On February 14, Spielfogel said he talked with Rudish in Manhattan. Rudish asked why Spielfogel was not taking part in the robbery and Spielfogel told him that he didn't like it. Again on Saturday afternoon Rudish made the same inquiry and Spielfogel said that it was because he didn't like the tipster. Rudish then said that he, Malinski and Beitler were going to meet at 9 o'clock that night. On Sunday when Rudish met Spielfogel in the afternoon he said that Malinski had "balled everything up. All he knows how to do is to throw a couple of shots." Rudish said that he had gone to Brooklyn to look for Spielfogel's uncle, whose address

[fol. 1489] Spielfogel had given him the day before in connection with another matter, but had lost the address; that when it was near 9 o'clock he stole the first car he saw and picked up Malinski on 8th Street and Beitler on Houston Street in the Borough of Manhattan. He said that after the robbery, he abandoned the car and went up on the Stillwell Avenue railroad station. He told Spielfogel that it sounded as though all the sirens in New York were in Coney Island. He said they obtained about $220 each and that Malinski received $20 extra because two of his guns were used.

Samuel Kovner, whom we have mentioned before as the convict who ate at Sing Sing prison with Spielfogel, testified that about five days before the murder while accompanied by Beitler he met Malinski and Indovino. Indovino talked of "a piece of work" at Coney Island. Indovino asked Beitler and Kovner whether they cared to undertake it. Kovner took Beitler aside and they talked and then Beitler told Indovino that Kovner was not interested because there was a cop in it. Indovino said he could not go because he was known in Coney Island and Beitler said he would look for a third man. Kovner next saw Beitler and Indovino about the 21st of February, six days after the murder. Indovino then asked Beitler for money. He saw him again two days later. Then Indovino was complaining that Beitler was too quick; that he did not have to shoot the policeman; that it would have been sufficient to put the gun against his back. A few days later he heard Indovino again asking Beitler for money.

In general that was the case presented against the defendants by the People, apart from a four day confession by Malinski which we have not considered, and there was sufficient there if believed to justify the conviction of the defendants of murder committed during a robbery. Counsel have urged upon us, however, that it was error for the court to submit to the jury the confession made by Malinski orally on October 23rd, by word and deed on October 25th and 26th and to an Assistant District Attorney and a stenographer in the early morning hours of October 27th. It is urged that the confession should have been excluded for two reasons. *First* that the defendant Malinski was not arraigned promptly before a magistrate and *Second* that the confession was obtained by fear produced by threats and assault.

[fol. 1490] Perhaps, it will be helpful before discussing the law as to those two contentions, if we quote the following in the words from the brief of counsel for Malinski in recounting Spielfogel's testimony: "That while Malinski was being questioned by the District Attorney he talked to Malinski which was about two weeks after he was brought down from Sing Sing. This took place in the Hotel Bossert. Malinski asked one of the lieutenants if he could speak to Spielfogel but the witness would not talk to Malinski. The police officers all said 'Go over and see what he wants' so he and Malinski went into the next room and Malinski said that he knew they had Jake [Rudish] in the next room and that they knew too much already; that he might as well go out there and tell them the rest. That he told Malinski that he was over twenty-one and Malinski then told the lieutenant he would tell the truth but did not want to go to the chair. The lieutenant promised Malinski nothing, saying 'This is a police case. You will have to take your chance,' and Malinski said he would 'like to bring in a Rabbi or a fellow by the name of Nat Math' ".

The latter was an Assistant District Attorney. Permission was refused Malinski to see either a rabbi or Mr. Math and he then confessed. That was on Friday, the day of his arrest. It was on the following day, after that confession, that the defendant Rudish and Indovino were arrested.

We shall first consider the question whether, when a prisoner is not brought before a magistrate without unnecessary delay, following his arrest, a confession obtained after such unnecessary delay is admissible at all or must be excluded. This Court has given earnest consideration to that problem in the past and has resolved it in favor of the admission of the confession to be followed by an instruction that it must be disregarded if obtained through fear produced by threats and that, in reaching a conclusion thereon, the jury may take into consideration the circumstance that the confession was obtained while arraignment was illegally delayed. (*People* v. *Mummiani*, 258 N. Y. 394; *People* v. *Alex*, 265 N. Y. 192.) It seems to us that applicable and convincing reasoning leading to that conclusion was declared with clarity in *People* v. *Defore* (Cardozo, J., 242 N. Y. 13, 23, 24, 25). [fol. 1491] We need not quote at length. There are a few sentences which indicate the reasoning. "We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequences would be. The

pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious. * * * We may not subject society to these dangers until the Legislature has spoken with a clearer voice. * * * The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the *Adams* case strikes a balance between opposing interests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected, shall give notice to the courts that the change has come to pass." We have made our choice.

It is next urged upon us that the confession should have been excluded *as a matter of law* because when Malinski was brought to the hotel he was stripped to see if there were any evidences of bullet wounds in view of the fact that the deceased officer had fired after the automobile, following the shooting, and because there was some evidence that at least one shot had struck the car. The stripping of Malinski for that purpose was concededly proper but complaint is made because he was left in his underwear for the greater part of the first day of his stay at the hotel. Malinski said that he was subjected to physical violence. The testimony as to the violence was not very strong. He said among other things that he was struck twice by a lieutenant and once by another police officer, "but not too hard" by the latter. "Not hard enough to throw me over. I was sitting in one of the armchairs." His lips were not cut; his nose did not bleed; his mouth bled on the inside. Such was Malinski's testimony. He did not complain to the prison doctor because he "didn't have no injuries." There was no testimony as to violence except by Malinski. Neither Rudish nor Indovino claimed to have been assaulted although in the same hotel with the same officers. Neither of them confessed to the police or District Attorney. Whether [fol. 1492] the confession therefore was induced by fear produced by threats and violence was for the jury to determine. They weighed his testimony as to the violence and they considered the fact that he was compelled to spend most of one day clothed in his underwear and a blanket and the ex-

case of the police that that was a way to prevent escape in the hotel. Whether these latter circumstances would produce fear so that a man would confess his crime would depend a great deal upon the type of man involved. We do not think it can be held *as a matter of law* that it brought about such fear that the confession followed. All those questions it seems to us were for the jury which saw Malinski and heard him. They were in a position to judge from his appearance and attitude what effect depriving him of his outer clothing would have upon him.

It is next urged upon us that the Assistant District Attorney gave his views as to the reason why Malinski was left in his underclothes and we are asked to reverse because of that. The three defendants on trial were represented by experienced counsel. It is true the Assistant District Attorney made the statements quoted in the dissenting opinion. The summation covers sixty-three printed pages. The first quotation is twenty-nine pages before the second. The District Attorney was interrupted by counsel fourteen times. Nearly all of those objections were made by the attorney for Malinski. Yet no interruption by objection was made to the remarks quoted. That is no excuse for the remarks but it is some indication of the fact that none of the counsel took them seriously. The remarks were indefensible. Whether under the circumstances a new trial should be ordered for Malinski because of these disconnected and disjointed utterances which at the time of their utterance brought not a single one of the counsel to his feet to make objection, is a matter of judgment. Our judgment is that the verdict should stand and be affirmed. Even apart from the fact that it did not appear important enough to counsel to cause them to register an objection immediately, the effect of the utterances it seems to us would inure to the benefit of Malinski rather than against him and they did not relate to Rudish or Indovino.

When we have spoken of Malinski's confession we include, of course, not only the confession made orally to a police [fol. 1493] officer on the Friday night of the arrest but also the two automobile trips on Sunday and Monday, one to the police garage to permit Malinski to identify the automobile used in the crime and the other to Coney Island to revisit a restaurant and the scene of the crime, and the confession to the District Attorney which was taken steno-

On the question of arraignment without unnecessary delay the court charged as follows: "Lieutenant McNally claims that he was willing to arraign Malinsky before a Magistrate on the very day, namely, Friday, when Malinsky was first brought to the Bossert, but that Malinsky stated that he would rather stay at the hotel with his friend Spielfogel than be thrown into a cell in a police station.

"Be that as it may, I charge you that it was the duty of the police to arraign the defendant before the nearest Magistrate without unnecessary delay, and, further, that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor.

"But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinsky, including the one made in the early hours of October 27th at the Bath Beach station house."

On the question of whether the stenographically transcribed confession of Malinski to an Assistant District Attorney should be accepted by the jury, the court charged as follows: "Although Malinsky does not deny that he made this confession, his contentions are:

"That the confession is valueless as evidence against him because it was made by him due to force and intimidation and fear visited upon him by the police authorities, and implied coercion because of the manner in which they kept him in custody from the time of his apprehension until he made this confession. You must find beyond a reasonable [fol. 1494] doubt that this confession was a voluntary one before you would have the right to consider it.

"Malinsky then urges a second objection to this confession. His claim is that the statements contained in this confession implicating him in this crime are untrue.

"Under the law, therefore, you will determine, first whether or not this confession is voluntary. If you find it was involuntarily made, or if you have a reasonable doubt

On the other hand, if you find beyond a reasonable doubt that the confession is a voluntary one, you will then determine whether or not the statements inculpating the defendant, therein contained, are true. If you shall have resolved both of these questions in favor of the prosecution, then and only then will you consider the confession in determining the guilt or innocence of the defendant of the crime of murder in the first degree."

We have gone to this length in setting out the facts because it seemed to us necessary to indicate that the most serious of crimes against duly constituted authority had been committed without witnesses; that it was an unsolvable crime if dependence were to be placed upon witnesses or clues; that fate decreed that there should be gathered and thrown together in Sing Sing prison three men who knew of the crime and one of whom, Spielfogel, who knew the most about it, was depending for his wife's support upon one of the active participants in the crime. It is quite evident that when Malinski proved faithless to his agreement, that Spielfogel unburdened himself to Yellin and Kovner but with no intention of acting against Malinski for, curiously enough, testimony is in this record that, after knowledge of what had occurred in the shooting of Fox reached the police department and a lieutenant of police was sent to Sing Sing prison to interview Spielfogel, he refused to talk to the police officer. Even after that police officer had told him all that Spielfogel must have told to Yellin and Kovner he still evinced no interest in helping the police. It was only later that he consented to talk.

One other matter should be mentioned. It is urged upon us that the trial court erred in leaving it to the jury as to whether Spielfogel was an accomplice. It is urged by counsel that the pistols used were pistols supplied by Spiel- [fol. 1495] fogel for the commission of this very crime and that we cannot say that a jury could have found that Spielfogel told the truth when he said that the pistols used were Malinski's pistols and not his.

That is not correct. Spielfogel testified that the pistols he had and put in the store where Malinski worked, on the morning of the day of the crime, were pistols that were to be used in connection with another crime to have been committed on Saturday morning or afternoon

and that in that other crime there was to have been another participant in addition to himself and Malinski. This court has laid down the sound rule on that question. We can do no better than to quote it. Again we take but a few sentences from *People* v. *Swersky* (216 N. Y. 471, 478, Cardozo, J.) which seem determinative of this question. "To permit a jury to say that he [Levinson] did join in it, when the only evidence is that he did not, would be to permit them [the jury] to build their verdict upon speculation and suspicion. Levinson, by his own confession, had committed many other crimes. But he did not commit this crime, either in person or by procurement." It may be that it could be argued that a finding by the jury that Spielfogel placed the pistols in the store for use in the robbery at Coney Island, would not be based only upon speculation and suspicion. However, the jury chose to believe Spielfogel's version of the incident. Whether or not we think a contrary finding would be speculative and based on suspicion, the contrary was *not* found and we cannot say that the jury was obligated to find it as a matter of law. Moreover, to find the contrary would be to disregard to a greater or lesser extent the testimony of Eisler.

When all is said and done these defendants had a fair trial and both confessed their guilt to persons other than the police or the District Attorney.

The judgments of conviction should be affirmed.

Dissenting Opinion

Lehman, Ch. J. (dissenting):

Late on the night of February 15, 1941, Leon Fox, a patrolman in the Police Department of the City of New York, was shot, and he died shortly thereafter as a result of bullet wounds. At the time of the shooting the police officer, in the course of his duties, was accompanying the manager of a moving picture theatre who was carrying the day's receipts to a bank. In November, 1942, more than [fol. 1496] a year and a half after the shooting the Grand Jury indicted Morris Malinski, Sidney Rudish and Joseph Indovino for "the crime of Murder in the First Degree, committed as follows: The defendants, on or about February 15, 1941, in the County of Kings, acting in concert with Abraham Beitler, deceased, wilfully, feloniously and of malice aforethought shot and killed Leon Fox, with a

pistol." The three defendants named in the joint indictment were jointly tried and found guilty. As part of the verdict against the defendant Indovino the jury recommended life imprisonment. No such recommendation was included in the verdict against the defendants Malinski and Rudish. They have appealed to this court. The verdict against Indovino has not been brought up for review to this court.

The testimony of the manager of the moving picture theatre shows that, as he and the police officer were walking toward the bank, a man jumped out of an automobile which was parked at the curb and shot Fox. The manager of the theatre attempted to run away with the bag containing the money he was taking to the bank, but he threw away the bag when the man who had shot the police officer said to him: "Drop the bag, or I'll drop you." The robber picked it up, jumped back into the car and the car sped away. Later during the same night an abandoned car was identified as the car used in the robbery. It had been stolen earlier that night.

No eye witness of the robbery was able to identify the men who took part in it. To connect the defendants with the crime the People produced associates of the defendants who gave testimony of incriminatory statements made by the defendants in furtherance of a conspiracy to rob the manager of the theatre in the Coney Island district of Kings County and, in addition, of incriminatory admissions made thereafter. To prove the guilt of the defendant Malinski, the People introduced, also a written confession made by Malinski while he was in the custody of the police, but before his arraignment.

David Yellin testified that a few days before February 15, 1941, he was introduced by Beitler, now deceased, to the defendant Indovino. He was told by them about a plan to rob the manager of the moving picture theatre. Indovino [fol. 1497] was the author of the plan, but said he would not accompany the others at the robbery because he was too well known in Coney Island. Beitler wanted one Spielfogel, known as "Slip", to take part in the robbery. Yellin saw Spielfogel the same night, but Spielfogel, distrusting Indovino, refused to go along. Yellin further testified that in the early morning after the holdup he met the defendant Rudish and Rudish told him that he had come back from a "trick" on Coney Island and that Beitler and Malinski

had shot a cop. At that time, according to Yellin, Rudish was carrying the "pieces" or guns, which he said had been used in the robbery. The witness Yellin had been committed to Sing Sing on December 12, 1941, upon a sentence of imprisonment for ten to twenty years for robbery while armed with a gun. Nathan Spielfogel had been sentenced to Sing Sing upon a conviction for the same crime to a term of imprisonment of thirty to sixty years. Both were serving their terms when the District Attorney was informed that these men knew who had killed the police officer.

Spielfogel testified that when Yellin spoke to him he had refused to take any part in the robbery because he distrusted Indovino and that on the next day he told Beitler, also, that he would not go along. According to his testimony, Beitler then asked him whether they could use some "pieces" or guns which apparently Beitler thought belonged to Spielfogel, and Spielfogel said:

"Those pieces don't belong to me. They are Malinski's pieces. If he gives them to you, you got them." He testified that at 1:30 on the morning of February 16, 1941, Malinski came to his house and told him that Beitler, Rudish and he had committed the robbery and gave him complete details as to the robbery. He told of other admissions alleged to have been made by Malinsky after the crime and these admissions are corroborated, at least in part, by the testimony of other witnesses. His testimony also implicates Rudish. Rudish, he said, told him early in the evening of February 15th that he, Malinski and Beitler were going to meet at 9 o'clock that night to carry out their conspiracy to rob the manager of the theatre and on the next day, Sunday, February 16th, he again saw Rudish and Rudish gave him full details of what had occurred that night.

[fol. 1498] The record is devoid of any testimony which tends to connect the defendant Rudish with the crime, other than the testimony of Yellin and Spielfogel. The Trial Judge charged the jury that Yellin was an accomplice as matter of law, for according to his own admissions he aided and abetted the defendants in their conspiracy. The Trial Judge left to the jury as a question of fact whether or not Spielfogel was an accomplice. It is, of course, not disputed that Spielfogel was an associate of the defendants and according to his own story, he had gone out with them on other "jobs." Nevertheless, he is not an accomplice in

the crime of robbery in the commission of which the police officer was killed unless he aided and abetted the defendants in *that* crime. The appellants now urge that his testimony conclusively proves that if the defendants committed the crime, the witness Spielfogel took part in furnishing the "pieces" or guns used in the robbery with knowledge that they were intended for such use. If that is true Spielfogel is an accomplice as matter of law.

These guns, according to the witnesses for the People, were hidden in the toilet connected with the store where Malinski worked and were taken from that toilet by Malinski on the afternoon or early evening of February 15th. Spielfogel admitted that he had put the guns in the store. On cross-examination the following questions were put to him, and he gave the following answers: "Q. Now on your direct examination you said that you put the guns in the store, is that right? A. What do you mean? When they came out of the cellar? Q. I am asking you, did you say that? You said before, 'I put the guns in the store'. Is that what you said? A. In the store? Q. Is that right? A. In the toilet in the store. Q. What? A. In the toilet. Q. You put the guns in the toilet in the store? A. Yes. Q. When was it that you put the guns in the toilet in the store? A. Saturday morning. Q. How many guns did you put in the toilet in the store? A. Four, to be exact. Q. And they were your guns? A. No, sir."

Later he explained that though he went with Malinski to hide the guns "it was not for that particular job," and in answer to a question put to him by the court he said it was in connection with another matter or proposed holdup. [fol. 1499] Spielfogel admits he hid guns which, he said, belonged to Malinski, and which were used by the robbers, but he claims that though he knew that Malinski was planning to hold up the theatre manager, yet he did not intend that Malinski should use his own guns in *that* holdup, but should use them in another matter. Except for that explanation of Spielfogel, the other evidence produced by the People would lead irresistibly to the inference that Spielfogel put the guns in the toilet with the purpose of aiding and abetting the "particular job" which was scheduled for that night. In *People* v. *Swersky*, 216 N. Y. 471, 478, the witness had been associated with the defendants in other crimes, but there was, as the court found, *no evidence* of any kind which would "implicate" the witness in the crime

with which the defendants were charged or that would "stamp Levinson [the witness] as an accomplice." Here we have evidence from which a reasonable person could hardly fail to draw an inference of guilty participation unless he accepts an explanation of the witness which, I think, calls for credulity possessed only by the naive and perhaps by those who are irked by the statutory rule that a conviction cannot be had upon the testimony of an accomplice "unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." (Code Crim. Pro. § 399.) In such case what was said and decided in *People* v. *Swersky* (*supra*) has no application. (*People* v. *Feolo*, 282 N. Y. 276.) A finding that Spielfogel was not an accomplice is, I think, clearly contrary to the evidence. That conclusion "disregards", as the prevailing opinion states, "the testimony of Eisler"; but only because I find nothing in Eisler's testimony which in the slightest degree tends to support an argument to the contrary. The conviction of Rudish thus rests upon the testimony of two witnesses who are accomplices as matter of law or, at least, shown to be accomplices by the great weight of evidence. The Trial Judge charged that no "other evidence" corroborates them. The verdict against Rudish should for that reason be set aside.

The evidence against Malinski is far stronger. The testimony of Yellin and Spielfogel is in his case corroborated by other witnesses who are not accomplices and he has [fol. 1500] signed a confession. If his confession is voluntary and was not made under the influence of fear produced by threats, his guilt has indeed been proven to a moral certainty. As to him the question then is whether the confession was admissible under the provisions of section 395 of the Code of Criminal Procedure and whether the defendant Malinski had a fair trial upon that question.

Malinski was taken into custody by two detectives at seven-thirty on the morning of Friday, October 23rd. He was taken, not to police headquarters, but to the Hotel Bossert in Brooklyn. There he was compelled to strip so that the police could see whether there were any scars of bullet wounds on his body. Concededly, after the police had made that inspection he was not permitted to put on his clothes, but was compelled to remain in his "shorts" or "B. V. D.'s" and a blanket until five-thirty that evening. That afternoon an Assistant District Attorney visited the

hotel room and saw that Malinski was being held there without his outer clothing, but apparently did not object. Malinski was kept at the hotel until the afternoon or evening of October 26th except for a visit with the police to a garage where the car used in the robbery was kept. During that time he complained of stomach trouble and asked for a doctor. That request was refused. At the police station to which he was taken on October 26th he was questioned by the District Attorney and then signed the written confession. On the morning of October 27th—four days after the police took him into custody—he was arraigned in court.

This testimony is uncontradicted. The defendant Malinski testified that he was beaten while in the Hotel Bossert and that his confession was extorted from him under the influence of fear. The testimony in regard to the beating by the police is contradicted by the police officers. A question of fact is thus presented whether the confession was admissible under section 395 of the Code of Criminal Procedure.

The Legislature has commanded that "The defendant must in all cases be taken before the magistrate without unnecessary delay". (Code Crim. Pro. § 165.) Here there has been a delay of four days. Except for the delay in [fol. 1501] arraigning a person arrested by the police, there would be no room for any claim that a confession made by the accused was extorted by threats or violence. We have said that "the police are guilty of oppression and neglect of duty when they willfully detain a prisoner without arraigning him before a magistrate within a reasonable time. (Code Crim. Pro. § 165.) The conclusion is inescapable that they do this for the purpose of subjecting him to an inquisition impossible thereafter." (*People* v. *Mummiani*, 258 N. Y. 394, 399.) The police lieutenant who was primarily responsible for the delay claimed that though the defendant was seized by the police on the morning of October 23rd, he was not "arrested" until October 26th when he made his written confession and that he was arraigned as soon as possible thereafter. The Legislature has defined arrest as "the taking of a person into custody that he may be held to answer for a crime." Malinski testified, without contradiction that at 7:30 in the morning of October 23rd two detectives "put guns into my head and they said, 'If you move, I will blow your brains out.'" They then put

handcuffs on him and took him to the Hotel Bossert. That the detectives did seize him and take him to the Hotel Bossert is not open to challenge. If the police officers were not exercising at that time their power to arrest, then it is plain that they were committing a crime. If, as appears plain, they did "arrest" the defendant Malinski, then his confinement by the police at the Hotel Bossert, or any other place, without prompt arraignment was contrary to the express command of the statute and was unlawful. We may understand the impatience of police officers at the restrictions imposed upon them by law in obtaining evidence necessary to convict a person of whose guilt they are certain, though the guilt has not at that time been established. Undoubtedly, the unpunished murder, by men intent on crime, of a police officer who has sought to prevent the crime, weakens respect for the law, but lawlessness in law enforcement weakens it no less. Free men for centuries have cherished as an essential part of their liberty the right to prompt arraignment in court when seized by the police. The statute also has commanded that officers of the law shall accord that right to every person they arrest. Invasion of that right cannot be justified by proof, [fol. 1502] however convincing, that the person who asserts it is not worthy of his liberty, or that the officers of the law desire only to obtain the evidence required by law to convict men of whose guilt they are convinced.

"An unfair trial, especially in a criminal case, is a reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but also upon the trial judge." (*People* v. *Wolf*, 183 N. Y. 464, 472.) The defendants may be depraved creatures who have committed a heinous crime. Nonetheless, until condemned by a jury after a fair trial and upon competent evidence they are entitled to the benefit of the presumption of innocence and to assert all those rights and privileges which have been formulated for the protection of the innocent by the Constitutions of the State and nation, by statutes, and by age old judicial decisions. The courts cannot permit either the prosecuting attorney or the police to decide whether the public interest would be advanced by disregard of the safeguards imposed by law for the protection of an accused. Such safeguards become valueless if they may be violated with impunity when judges or law enforcement

officers conclude that otherwise a guilty man might escape punishment.

In this case there can be no doubt that the police officers flagrantly disregarded the provisions of section 165 of the Code of Criminal Procedure by holding the defendant Malinski at the Hotel Bossert and postponing arraignment until after they had obtained a written confession. Their explanation may show that their conduct was due solely to zeal in seeking evidence through which the guilt of the defendants could be established at a trial. It furnishes no justification for their wrong. We are told that even though that may be true and even though the lawless conduct of the police in that respect may have furnished the police with opportunity to obtain the confession, nevertheless, the confession was properly admitted in evidence and could be given weight by the jury if the jury found that it was not induced by fear.

In this State we have repeatedly held that the evidence otherwise competent may not be rejected on the ground that it was obtained by unlawful means. (*People* v. *Defore*, [fol. 1503] 242 N. Y. 13.) A confession which is not incompetent under the provisions of section 395 of the Code of Criminal Procedure is not to be rejected because the accused was unlawfully detained by the police without arraignment for the purpose of obtaining the confession. "Nevertheless, in determining whether a confession has been obtained as a result of a beating, or is voluntary, the circumstance that it was obtained while arraignment was illegally delayed for no apparent reason except that the police needed a confession in order to have competent proof of the commission of a crime, should be considered by the jury." (*People* v. *Alex*, 265 N. Y. 192, 194.) We must examine the record in this case to determine if there has been a fair trial in this case of the question whether the confession under the circumstances here disclosed was obtained as a result of threats or violence.

The Assistant District Attorney who tried the case has stated in the summation what occurred at the Hotel Bossert while Malinski was being detained there and what effect should, in his opinion, be given by the jury to what there occurred. Without analyzing the testimony to determine the accuracy of what was said in the summation I quote the parts that seem to me most significant:

"* * * Malinski was held and he was allowed to sleep there. He could not get away. When McNally was asked, 'Did you place him under arrest?' he probably meant he did not book him right away. They hold men for several days. Are you satisfied with that? *They are not going to let him go home, or let him get hold of a smart mouthpiece to preach about his rights and sue out writs.* You want a district attorney in this county that is worth his salt, not a powderpuff district attorney. When you are trying a case of murder, especially murder of a police officer, you don't go over and give him a pat on the back and say, 'Do you want anything? Do you want to have your lawyer or your wife or somebody else?' In fact after they would not even let him see Mr. Math, an assistant in our office; they would not even let him talk to a rabbi. Do you think McNally, 17 years in the Police Department is going to let this jerk from the East Side tell him his business? * * *.

[fol. 1504] "* * * Why this talk about being undressed? Of course they had a right to undress him to look for bullet scars, and keep the clothes off him. *That was quite proper police procedure.* That is some more psychology—let him sit around with a blanket on him, *humiliate him for a while; let him sit in the corner, let him think he is going to get a shellacking.* McNally took one look at him and said, 'Come here'—just a little tough talk—'what do you know about it?' Six o'clock in the evening after he was picked up he told the whole thing." (Italics are mine.)

In a recent case in the Supreme Court of the United States in which a judgment of conviction in a Federal court was challenged on the ground that at the trial a confession was admitted in evidence though obtained while the accused was detained by law enforcement officers in violation of a statute requiring prompt arraignment, the Supreme Court said: "In formulating such rules of evidence for federal criminal trials the court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance. Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the

pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding. * * *.

"* * * The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. * * *.

"* * * Legislation such as this, requiring that the police must with reasonable promptness show legal cause [fol. 1505] for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection. A statute carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application. * * *.

"* * * The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. * * *.

"* * * We are not concerned with law enforcement practices except insofar as courts themselves become instruments of law enforcement. We hold only that a decent

regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." (*McNabb* v. *United States*, 318 U. S. 332, at pp. 341-345, and 347.)

We cannot close our eyes to the fact that our frequently and solemnly repeated admonitions to law enforcement officers that they are not above the law and may not in their zeal to obtain convictions hold, without arraignment, persons suspected of crime in order to have opportunity to obtain confessions, are often unheeded.

[fol. 1506] Perhaps the remedy is by legislation providing that in the courts of this State, as in the Federal courts, evidence obtained by flagrant violation of the rights of the individual must be excluded. However persuasive may be the reasons which have led the Federal courts to adopt that rule, we cannot do so. The contrary rule of evidence has been so long established by repeated decisions of this court and has been the subject of so many debates in the Legislature and in the Constitutional Convention of 1938 that change of the rule now by the court, without legislative sanction, would be an encroachment upon the legislative field. The confession is admissible if the jury find that the confession is not made "under the influence of fear produced by threats." The function of this court in reviewing a judgment resting in part upon a confession, obtained by unlawful means, is confined to the inquiry "whether there has been a fair trial of this issue at which the prosecution has presented testimony which would enable the triers of the fact to determine that issue fairly and truly." (*People* v. *Mummiani*, *supra*, p. 398.)

Here we are agreed that a finding by the jury that the defendant's confession, though obtained while he was unlawfully detained without arraignment, is not against the weight of the evidence. The officers of the law deny that they beat the defendant or threatened him. Whatever may have been the motive of the police in taking Malinski to the Hotel Bossert instead of to a police station or jail, we find no basis for any inference that the police believed

that the hotel was an appropriate place where a person could, without too much risk of discovery, be beaten in order to compel a confession. Nonetheless, in this case, as in *People* v. *Mummiani* (*supra*, pp. 399-400) "the conclusion is inescapable" that the police delayed the arraignment of the defendant "for the purpose of subjecting him to an inquisition impossible thereafter" at which he might be induced to make a confession by resort to what the Supreme Court of the United States has described as "those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." There can be no fair trial of the issue whether the confession is voluntary where the jury is not properly in- [fol. 1507] formed that the detention was unlawful and that they must take that fact into consideration. That has not been done in this case.

It is true that in the charge of the court the jury was informed that "it was the duty of the police to arraign the defendant before the nearest Magistrate without unnecessary delay and further if a police officer fail or refuse to perform such duty, he is guilty of a misdemeanor," and that "*if* you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27th at the Bath Beach station house." That instruction is not sufficient where, as in this case, the evidence produced by the People conclusively shows that the police flagrantly disobeyed the express mandate of the law. Even if there had been question in this case that the delay in arraignment was not "unnecessary" within the meaning of section 165 of the Code of Criminal Procedure, that question was not properly submitted to the jury. I have quoted what the Assistant District Attorney told the jury in his summation. The jury was urged to find that the police act properly when they hold a suspect incommunicado in order to induce him to incriminate himself before he can "get a smart mouthpiece to preach about his rights and sue out writs." Worse than that the jury was informed that it was "quite proper police procedure" to keep a man undressed for hours in order to "let him think he is going to get a shellacking" and thus perhaps to obtain a confession "under the influence of fear induced by threats," even though the threats be implied rather than expressed.

Failure of counsel to interrupt the summation by objection to these remarks, though counsel did interrupt by objection to other statements, indicates, it is urged, that these comments of the District Attorney did not seem important to counsel. Counsel did, however, move at the close of the summation for a mistrial because of these statements, and the trial court in denying the motion failed to indicate in any way that there was no justification for the comments of the District Attorney and that the jury must disregard them.

The prosecuting attorney is an officer of the State and he speaks to the jury with added weight because of his office. [fols. 1508-1509] His remarks here went unrebuked by the court and the jury was not informed even that if the defendant made his confession because he believed he might "get a shellacking" it would be inadmissible. We are loath to believe that the police did actually act as the Assistant District Attorney says they did. We certainly cannot say that the police did not do so and we should not hesitate to reverse a judgment which is the result of a trial at which the jury was led to believe that such practices were lawful and proper. A great citizen and a great jurist has said:

"An expert Bar, tenacious of its rights and also aware of their limitations can aid the courts by keeping within the lines and by not attempting to play off-side. Let us not talk simply of rules of procedure in the desire to obtain the appropriate punishment of crime and the enforcement of law, but make it our concern that trials of criminal cases shall be less a game to please the spectators than a serious and successful effort to deal promptly and efficiently with a precise charge with no right infringed and no nonsense tolerated.

"Liberty and law—one and inseparable! The noblest endeavor of democracy to safeguard the one by intelligence in the other!" (Presidential address of Charles Evans Hughes to the American Bar Association, 1925.)

The judgment should be reversed and a new trial ordered.

Lewis, Desmond and Thacher, JJ., concur with Conway, J.; Lehman, Ch. J., dissents in opinion in which Loughran and Rippey, JJ., concur.

Judgments of conviction affirmed. (See 292 N. Y. —.)

[fol. 1510] In Court of Appeals of New York

The People of the State of New York, Respondent,

ag'st

Sidney Rudish, Appellant

Remittitur—April 21, 1944

Be It Remembered, That on the 12th day of November, in the year of our Lord one thousand nine hundred and forty-three, Sidney Rudish, the appellant in this action, came here unto the Court of Appeals, by John J. Fitzgerald, Julian V. Carabba, and Samuel M. Meadow, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court of the County of Kings.

And The People of the State of New York, the respondent in said action, afterward appeared in said Court of Appeals by Thomas Cradock Hughes, Acting District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. John J. Fitzgerald of counsel for [fol. 1511] the appellant, and by Mr. Henry J. Walsh, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the County Court of the County of Kings appealed from in this action, be and is hereby in all things Affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court of the County of Kings before the Judges thereof, according to the form of the statute in such case made and provided.

(S.) John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, April 21, 1944.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

(S.) John Ludden, Clerk. (Seal State of New York Court of Appeals.)

[fol. 1512] IN COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

ag'st

MORRIS MALINSKI, True Name Morris Malinsky, Appellant

REMITTITUR—April 21, 1944

Be It Remembered, That on the 12th day of November, in the year of our Lord one thousand nine hundred and forty-three, Morris Malinski, true name Morris Malinsky, the appellant, in this action, came here unto the Court of Appeals, by Joseph Solovei and David F. Price, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court of the County of Kings.

And The People of The State of New York, the respondent in said action, afterward appeared in said Court of Appeals by Thomas Cradock Hughes, Acting District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 1513] Whereupon, The said Court of Appeals having heard this cause argued by Mr. David F. Price, of counsel for the appellant, and by Mr. Henry J. Walsh, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the County Court of the County of Kings, appealed from in this action, be and is hereby in all things Affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

And afterwards, to wit, on the 18th day of May, 1944, an order was duly made amending the remittiturs herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court of the County of Kings, before the Judges thereof, according to the form of the statute in such case made and provided.

(S.) John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, April 21, 1944.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

(S.) John Ludden, Clerk. (Seal State of New York Court of Appeals.)

[fols. 1514-1515] IN COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

vs.

MORRIS MALINSKI, True Name Morris Malinsky, and SIDNEY RUDISH, Appellants

ORDER AMENDING REMITTITURS—May 18, 1944

Motions to amend the remittitur in the above cause having heretofore been made herein upon the part of the appellants, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motions be and the same hereby are granted and the remittitur amended by adding thereto the following:

Questions under the Constitution of the United States were presented and necessarily passed upon.

The defendant Rudish contended that the admission of the confession of his co-defendant Malinski in evidence against Malinsky was a denial to the defendant Rudish of due process under the Fourteenth Amendment to the Constitution of the United States.

The defendant Malinski contended that the admission in evidence of his alleged confession and his identification of the "murder car" and his description of the events at the scene of the murder violated his rights under the Fourteenth Amendment to the Constitution of the United States.

This court held that the rights of neither defendant under the Fourteenth Amendment to the Constitution of the Unied States had been violated or denied.

And the County Court, Kings County, State of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

(S.) Raymond J. Cannon, Deputy Clerk.

[fol. 1516] In Court of Appeals of New York

The People &c., Respondent,

vs.

Morris Malinski and Sidney Rudish, Appellants

Order Denying Motion for Reargument—June 14, 1944

A Motion for a re-argument of the above cause, having been heretofore made upon the part of the appellants herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied.

A Copy.

Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 1517] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 367

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—October 9, 1944

On Consideration of the motion for leave to proceed herein *in forma pauperis*,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 1518] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 367

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted, and the case is assigned for argument on Monday, December 4, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

AUG 16 1944

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 367

MORRIS MALINSKI and SIDNEY RUDISH,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York and Brief in Support thereof.

JOHN J. FITZGERALD,
DAVID F. PRICE,
JOSEPH A. SOLOVEI,
Counsel for Petitioners.

229 EDWARD D. O'DONNELL, 21 Spruce Street, New York, N. Y.

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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No.

MORRIS MALINSKI and SIDNEY RUDISH,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATES JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Morris Malinski and Sidney Rudish, respectfully represent the following:

Summary Statement of Matter Involved.

Your petitioners, together with Joseph Indovino, were convicted of murder in the first degree, in the County Court, Kings County, New York State, on July 19, 1943, and your petitioners were sentenced to be executed* (Rec., pp. 91-92; 95-96).†

On an appeal to the Court of Appeals of the State of New York, the judgment of conviction was affirmed by a divided

* A stay of execution was granted by the order of Mr. Justice Jackson, dated June 19th, 1944.

† References to pages of Record on Appeal in the Court of Appeals of the State of New York.

court. A motion for a re-argument in the Court of Appeals, returnable June 12, 1944, was denied without opinion on June 14, 1944 (Order of Court of Appeals, June 14, 1944). The petitioners are under sentence of death. Alleged confessions of the petitioner, Morris Malinski, were admitted in evidence over objection and exception by the petitioners, and objection was specifically made, that the admission of such confessions was a denial "of due process" under the Fourteenth Amendment of the Constitution of the United States.*

The remittitur of the Court of Appeals recites that:

> "Questions under the Constitution of the United States were presented and necessarily passed upon.
>
> The defendant Rudish contended that the admission of the confession of his co-defendant Malinski in evidence against Malinski was a denial to the defendant Rudish of due process under the Fourteenth Amendment to the Constitution of the United States.
>
> The defendant Malinski contended that the admission in evidence of his alleged confession and his identification of the 'murder car' and his description of the events at the scene of the murder, violated his rights under the Fourteenth Amendment to the Constitution of the United States.
>
> This Court held that the rights of neither defendant under the Fourteenth Amendment to the Constitution of the United States had been violated or denied."

During the trial a motion was made on behalf of Malinski to set aside the verdict on a number of grounds, among which was "that the Court in admitting the confession in evidence deprived the defendant Morris Malinski of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; * * * that the de-

* *Vide* Order of the Court of Appeals of New York, dated May 18, 1944, amending remittitur (292 N. Y. 686, Adv. Sheet, No. 274).

fendant Malinski was deprived of due process of law in violation of * * * the Fourteenth Amendment of the United States Constitution by reason of the fact that the arresting officers failed to arraign the defendant Morris Malinski at the time of his arrest before a magistrate having jurdiction to take his examination; * * * that the Court's charge to the jury deprived the defendant Morris Malinski of due process in violation * * * of the Fourteenth Amendment of the United States Constitution".

The motion was denied and an exception duly taken (Rec., pp. 1457-1459).

A similar motion was made on behalf of Rudish upon a number of grounds, among which were "that this defendant was deprived of his constitutional rights" in "that evidence was admitted during the course of the trial which deprived the defendant Rudish of due process in violation of the Fourteenth Amendment of the United States; * * * that the Court's charge to the jury deprived the defendant Rudish of due process of law in violation of * * * the Fourteenth Amendment of the Constitution of the United States". (Rec., p. 1460). The motion was denied and an exception duly taken (Rec., pp. 1462, 1463, 1465).

The jury recommended "life imprisonment" for Indovino, which penalty was imposed. His conviction was not passed upon by the Court of Appeals (292 N. Y. 360, 364) and is not involved herein.

There were two opinions filed by members of the Court of Appeals (292 N. Y. 360).

The opinion upholding the conviction was written by Judge Conway and concurred in by Judges Lewis, Desmond and Thatcher; a dissenting opinion was filed by Chief Judge Lehman, with whom Judges Loughran and Rippey concurred (292 N. Y. 376).

In his dissenting opinion, Chief Judge Lehman said (p. 384):

> "A confession which is not incompetent under the provisions of section 395 of the Code of Criminal

> Procedure is not to be rejected because the accused was unlawfully detained by the police without arraignment for the purpose of obtaining the confession. 'Nevertheless, in determining whether a confession has been obtained as the result of a beating, or is voluntary, the circumstances that it was obtained while arraignment was illegally delayed for no apparent reason except that the police needed a confession in order to have competent proof of the commission of a crime, should be considered by the jury' (Peo. v. Alex, 265 N. Y. 192, 194). We must examine the record in this case to determine if there has been a fair trial in this case of the question whether the confession under the circumstances here disclosed was obtained as a result of threats or violence."

Again, at page 387:

> "Nonetheless, in this case, as in People v. Mummiccai (supra, pp. 399-400),* 'the conclusion is inescapable,' that the police delayed the arraignment of the defendant 'for the purpose of subjecting him to an inquisition impossible thereafter,' at which he might be induced to make a confession by resort to what the Supreme Court of the United States has described as 'those reprehensible practices known as the "third degree," which, though universally rejected as indefensible, still find their way into use.' There can be no fair trial of the issue whether the confession is voluntary where the jury is not properly informed that the detention was unlawful and that they must take that fact into consideration.' That has not been done in this case."

The question involved is whether the admission in evidence of certain confessions of the petitioner, Malinski, was a denial "of due process" under the Fourteenth Amendment of the Constitution of the United States.

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* 258 N. Y. 394.

Details of Crime.

On February 15, 1941, at eleven o'clock, P. M., Leon Fox, a patrolman of the Police Force of the City of New York, was shot and killed. At the time of the homicide he was escorting the manager of Loew's Theatre in Coney Island, Borough of Brooklyn, City and State of New York, to a bank depository. The manager had the day's receipts of the theatre, consisting of seven hundred dollars in bills, and seven rolls of quarters of ten dollars each in a burlap bag. As they approached the depository, a branch of the Brooklyn Trust Company, located at Surf Avenue and West 12th Street, Coney Island (Rec., pp. 127-128), they noticed an automobile parked on West 12th Street, south of Surf Avenue, with the lights out and the motor running. As they reached the vicinity of the car, they were "jumped" by two men, one of whom came out of the automobile; the officer was shot, the bag containing the money taken; the two men entered the car, which sped away at a high rate of speed. None of the occupants of the car, nor the participants in the robbery and killing were ever identified (Rec., fols. 386-393). The petitioners herein, Malinski and Rudish were indicted with Joseph Indovino for the homicide. The testimony against the defendants was given chiefly by David Yellin,* Nathan or Slip Spielfogel† and Samuel Kovner,‡ three criminals then serving time in States Prison.

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* Yellin was serving a term of from 10 to 20 years, for a "stick-up", convicted December 12, 1941 (Rec., p. 221).

† Spielfogel, as a second offender, was under sentence of from 30 to 60 years, for complicity in the same "hold-up" in which Yellin was convicted (Rec., pp. 295, 246).

‡ Kovner was serving a term of from 15 to 30 years for a "stick-up" committed December 15th, 1940 (Rec., p. 679).

The indictment is as follows:

> "The Grand Jury of the County of Kings, by this indictment, accuse the defendants of the crime of Murder in the First Degree, committed as follows:
>
> The defendants, on or about February 15, 1941, in the County of Kings, acting in concert with Abraham Beitler, deceased,** wilfully, feloniously and of malice aforethought, shot and killed Leon Fox, with a pistol" (Rec., p. 11).

The only testimony against the petitioner Rudish, was given by Yellin and Spielfogel (Rec., pp. 221-288; 295-447).

The incriminating testimony consisted very largely of conversations alleged to have been had between Beitler, Yellin and Indovino; Beiter, Indovino and Kovner; Malinski and Spielfogel; and Rudish, Spielfogel and Yellin. The conversations related largely to the planning of the robbery, and those between Rudish and Yellin, and Rudish and Spielfogel as to Rudish's alleged participation in the affair—all of such conversations having occurred immediately subsequent to the homicide (Rec., pp. 221-288; 315-320).

The witness Yellin was held to be an accomplice as a matter of law (Rec., p. 1347).

The Court of Appeals divided, four to three, on whether Spielfogel was an accomplice. The majority of the Court held that whether he was an accomplice was properly submitted to the jury as a question of fact (292 N. Y. 360, at 376); the minority ruled that the evidence established him to be an accomplice as a matter of law, or if not, that the evidence overwhelmingly proved him to be so as a matter of fact (292 N. Y. 360, at 380).

If Spielfogel were an accomplice, Rudish's conviction could not stand, since in New York State a conviction

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** Beitler was dead at the time of the trial (Rec., pp. 679-681).

cannot be had upon the uncorroborated testimony of an accomplice.*

Circumstances Under Which Confessions Obtained.

The testimony establishes that on October 23, 1942, Morris Malinski was living with his family at 714 Hinsdale Street, Brooklyn, N. Y. (Rec., pp. 548; 945). He left his home shortly after 7 A. M. that morning to proceed to work. When he had gone a short distance, he was accosted by two men who put pistols to his head. He was handcuffed, taken to an automobile, placed in it and driven away. He asked if he were being kidnapped and told to keep still. He was driven to the Bossert Hotel, in Brooklyn, a distance of five or six miles. During the drive a number of police stations, police headquarters, the County Court of Kings County, and the office of the District Attorney of Kings County were all passed. No stop was made. The Hotel Bossert was reached at eight o'clock and Malinski was immediately taken to a room where Lieut. McNally was present. Malinski was immediately stripped, naked.†

After being stripped naked at the Bossert Hotel, he was kept that way for a while, and then given his BVD's. Later he was given a blanket. The testimony is conflicting as to the length of time he remained undressed (Rec., pp. 587-588; 607; 595-596); but one officer attached to the district attorney's office, testified that he was still in his stripped condition when he returned to the room in the Bossert Hotel at 3:00 A. M. Saturday morning (Rec., pp. 595-596). The reason assigned by the police for strip-

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* Section 399 of the New York Code of Criminal Procedure provides that "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

† Malinski claims by force; the police say he undressed voluntarily (Rec., pp. 549; 574; 595; 605-606).

ping Malinski was to ascertain whether there were any bullet wounds or scars on his body (Rec., p. 584), although the homicide had been effected twenty months previously (Rec., pp. 11-12). What was found on examining Malinski's body was evidence of twenty-one skin graftings on his chest and abdomen, necessitated by severe burns when he was a child (Rec., pp. 551; 596).

Malinski also testified that while he was still stripped, he was taken to an open window, his clothes placed on the window sill and that the police threatened to throw him out the window (Rec., p. 551). This was denied by the police (Rec., p. 572).

As soon as Malinski was brought to the hotel, Lieut. McNally 'phoned Edward Heffernan, an assistant district attorney, who had been working on the case with the police. Malinski testified that during the afternoon, Heffernan came to the hotel and questioned him about the Fox killing and left in disgust because Malinski denied all knowledge of the affair (Rec., p. 550). Lieutenant McNally testified that Heffernan came to the room where Malinski was, was told who he was, looked at him and walked out without speaking to him (Rec., p. 576). Another highly improbable story—that the public prosecutor, notified of the arrest of a suspect in a murder case on which he was working, merely looked at the suspect and did not question him at the earliest opportunity. Although Heffernan was present in the court room at the trial he was not called as a witness (Rec., pp. 325-326). Malinski claimed that the police had beaten him from time to time during the day, Friday, October 23, 1941 (Rec., pp. 549; 551; 555; 557-558). The police denied it (Rec., pp. 572; 592; 604; 613). Some time in the course of the day, about 5 or 6 o'clock in the afternoon, it is claimed that Malinski made a full confession (Rec., p. 576). No transcript was made of any such confession. Later in the evening, about 9 o'clock, Malinski was questioned in the presence of the Acting District Attorney, Thomas Cradock Hughes, Assistant District Attorney Hef-

fernan, Captain McGowan, Captain Dowdell, and Lieutenant McNally. No record was made of any statements made at that time by Malinski. None of the persons mentioned as being present at that time, ever denied his presence or that what Malinski testified had occurred there had never happened (Rec., p. 851). The following day, Saturday, October 24, 1942, Malinski complained of illness and asked for a doctor (Rec., p. 562). His request was refused (Rec., p. 563). He also requested permission to see a Rabbi, and an assistant district attorney named Nat Math; both requests were refused (Rec., pp. 322; 1254). Some sort of medicine or drug was given to him by one of the police officers to alleviate the stomach condition of which he complained (Rec., p. 596). He was questioned all day Saturday and into the night. The following day (October 25, 1942) he was questioned further and eventually taken to a police garage. It is claimed by the People that he there identified the car which had been used in the affair. He denied doing so, and his conduct substantiates his claim.*

He was questioned further and at length on that and on the following Monday, when he was taken to the scene of the crime (Rec., p. 644). All of this time he was held *incommunicado* in the Bossert Hotel. When Lieut. McNally was asked why, if the police had a complete confession at about five or six o'clock on Friday, October 23rd, that Malinski had participated in the brutal killing of a fellow member of the police department, he was not locked up in jail, McNally answered that Malinski had remained at the hotel of his own volition. That he was given the choice of going to jail or remaining at the hotel, and he chose to remain at the hotel with his "pal," Spielfogel.

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* He was asked to open one of the doors of an automobile claimed to have been the one used. He took his handkerchief from his pocket and grasped the handle with his handkerchief, asking at the same time whether the police were trying to "frame" him by inducing him to do something which would leave his finger prints on the car (Rec., pp. 949-959).

although Spielfogel was locked up in jail every night (Rec., pp. 580-581), while Malinski was kept *incommunicado* in the hotel.

On Monday, the 26th, Malinski was questioned further and was taken in an automobile over the route alleged to have been followed by the killers to the scene of the crime. He was accompanied by detectives and Spielfogel. The People contend that he voluntarily described the actions of the participants preceding the killing and during the "stick-up" during which the homicide was effected. Malinski contends that the information furnished by him was given him by Spielfogel from time to time. That they conversed in Yiddish and that Spielfogel continually urged him to give the answers he suggested, as by so doing Malinski would avoid further ill treatment. About three o'clock in the afternoon of October 26, 1943, the party arrived at the Bath Beach or 62nd Precinct, station house. Malinski was questioned off and on until 2:10 A. M., October 27, 1943, when a statement then made by him as a result of questioning by Assistant District Attorney Hefernan, was taken by a stenographer, and later transcribed (Rec., pp. 552-553; 579).† Then about 5:30 or 5:45 A. M., Tuesday morning, October 27, 1942, after having been held *incommunicado*, from 7:15 A. M. of October 23, 1942, your petitioner, Malinski, was booked, or formally placed under arrest by having a charge entered against him.*

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† Evidently the alleged "full confessions" were unsatisfactory and so the questioning was continued until one was obtained which met the requirements of the police.

* "The defendant must, in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night" (N. Y. Code of Criminal Procedure, Sec. 165.)

Section 1844 of the Penal Law (N. Y.), provides that

> "A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays

"If, as appears plain, they did 'arrest' the defendant Malinski, then his confinement by the police at the Hotel Bossert, or any other place, without prompt arraignment was contrary to the express command of the statutes and was unlawful." (Opinion of Chief Judge Lehman, p. 382.)

Lieut. McNally testified that Malinski was arrested Tuesday morning, October 27, 1942 (Rec., pp. 580; 587).

During the trial, Malinski testified in his own behalf and denied emphatically that the admissions in the alleged confession were true, or that he had participated in any manner whatsoever in the robbery and killing (Rec., pp. 955; 956; 961).

In addition to the oppressive conduct of the police and prosecuting officers, there were other violations of petitioners' rights so highly prejudicial as to deprive them of a fair trial under the Fourteenth Amendment. For instance during the final address of the assistant district attorney remarks were indulged in of so highly a prejudicial and vicious character as to vitiate the trial. There is no dispute as to their indefensible character. All the Judges of the Court of Appeals are in agreement as to their objectionable character. Their impropriety was a denial of that fundamental concept of justice and fairness that are essential to a fair and impartial trial imperative under the Fourteenth Amendment? The remarks and their impropriety are fully set forth and discussed in the brief accompanying this petition (*post*, pp. 21, 22, 25).

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to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

In *People* v. *Mummiani* (258 N. Y. 394, 399), it was said:

"The police are guilty of oppression and neglect of duty when they wilfully detain a prisoner without arraigning him before a magistrate within a reasonable time (Code of Crim. Proc., sec. 165). The conclusion is inescapable that they do this for the purpose of subjecting him to an inquisition impossible thereafter."

As to Rudish.

"The conviction of Rudish," said Chief Judge Lehman, in the dissenting opinion, "thus rests upon the testimony of two witnesses who are accomplices as matter of law or, at least, shown to be accomplices by the great weight of evidence. The Trial Judge charged that no 'other evidence' corroborates them. The verdict against Rudish should for that reason be set aside" (*Peo. v. Malinski*, 292 N. Y. 360, 380).

That statement evidences how vital to Rudish was the admission of evidence harmful to him. After proceedings on the *voir dire* to determine whether the alleged written confession of Malinski should be admitted and submitted to the jury, the Court decided to admit the confession. After some discussion, the Court directed that certain names should be deleted and in their places, the designations "X" and "Y" be used (Rec., pp. 618-620).

In the alleged confession, Malinski involved both Rudish and Indovino, and it was those names which the Court directed should be suppressed and for which "X" and "Y" should be substituted. The device was futile. As soon as Malinski was called to testify in his own behalf, a few questions by his counsel developed that "X" and "Y" were respectively Rudish and Indovino (Rec., pp. 953; 962). As said in *Anderson v. United States*, Law Ed. Adv. Opinions, Vol. 87, No. 10, page 589:

> "The government urges that even if the confessions are held to be inadmissible, only the convictions of the six petitioners who confessed should be reversed. The prosecution rested principally on these confessions and the testimony of an informant, Fred Long, whose credibility was under severe attack. The incriminating statement of each petitioner implicated all the others including those who did not confess. *To be sure, the trial court devised a proce-*

dure under which the confessions were introduced without mention of the names of the other persons implicated. But their names were, in fact, revealed in the course of the cross-examination of the confessing petitioners." (Italics ours.)

The only testimony against Rudish was given by Yellin and Spielfogel. Yellin was held to be an accomplice as a matter of law (*ante*, p. 6); the Court of Appeals divided sharply by four to three as to the status of Spielfogel (*ante*, p. 6). Spielfogel was under severe attack as to whether he had been an actual participant in the crime. The confession of Malinski must have had tremendous influence with the jury in determining Rudish's guilt. If it were wrongfully admitted, the conviction of Rudish should not be permitted to stand.

Grounds Upon Which the Jurisdiction of This Court Is Invoked.

It is respectfully submitted that this Court has jurisdiction of this petition for certiorari under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, section 1 (43 Stat. 937); 28 U. S. C. A., Section 344 (b), such petition being one to review the final judgment of the Court of Appeals of the State of New York in which a decision could be had, rendered April 20, 1944.

The judgment affirmed a judgment for sentence of death (Rec., pp. 91-92; 95-96); and in said Court of Appeals petitioners especially set up and claimed, under the Fourteenth Article of Amendment of the Constitution of the United States, the right, privileges and immunity against being deprived by the State of New York of their rights and liberty without due process of law, "and," as certified by the Court of Appeals, "this point was considered and necessarily decided by this Court" (Order Amending Remittitur, dated May 18, 1944), this point having been specifically presented in the briefs on behalf of Malinski and

Rudish, on the argument of the appeal from the judgment of conviction and death of the County Court of Kings County, New York State, and specifically on the trial.

Reasons Relied Upon for the Allowance of the Writ.

The Court of Appeals of the State of New York has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court in that the Court of Appeals of the State of New York has affirmed a judgment and sentence of death wherein tested by an appraisal of the totality of the facts in this case (*Betts v. Brady*, 316 U. S. 455, 462), petitioners were deprived of their lives and liberty without due process of law.

See:

Ashcraft v. Tenn., 88 L. ed., Adv. Op., No. 14, 858;
Ward v. Texas, 316 U. S. 547;
McNabb v. U. S., 87 L. ed., Adv. Op., No. 10, 579;
Anderson v. U. S., 87 L. ed., Adv. Op., No. 10, 589;
Lisenbà v. California, 314 U. S. 219;
Chambers v. Florida, 309 U. S. 227;
White v. Texas, 310 U. S. 530;
Vernon v. Alabama, 313 U. S. 547;
Lomax v. Texas, 313 U. S. 544;
Canty v. Alabama, 309 U. S. 629;
U. S. v. Mitchell, 88 L. ed., Adv. Op., No. 13, 812;
Brown v. Mississippi, 297 U. S. 278;
Viereck v. U. S., 87 L. ed., Adv. Op. No. 10, 529;
Pierre v. Louisiana, 306 U. S. 354;
Betts v. Brady, 316 U. S. 455;
Lyons v. Oklahoma, 88 L. ed., Adv. Op., No. 16, 1076.

WHEREFORE, your petitioners, Morris Malinski and Sidney Rudish, pray that a writ of certiorari may issue out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, commanding the said

Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the Court of Appeals of the State of New York affirming the judgment in this cause may be reversed and that the petitioners, Morris Malinski and Sidney Rudish, may have such other and further relief in the premises as this Court may deem proper.

Dated, August 15, 1944.

MORRIS MALINSKI,
SIDNEY RUDISH,
Petitioners.

JOHN J. FITZGERALD,
DAVID F. PRICE,
JOSEPH A. SOLOVEI,
Counsel for Petitioners.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

JOHN J. FITZGERALD,
Counsel for Petitioners.

he Supreme Court of the United States

OCTOBER TERM, 1944.

No.

MORRIS MALINSKI and SIDNEY RUDISH,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

ief in Support of Petition for Certiorari.

e two opinions of the Court of Appeals of the State
ew York are officially reported in the weekly advance
s No. 267, June 10, 1944, 292 N. Y. 300. No opinion
handed down on the denial of the motion for re-argu-

Statement of Jurisdiction, Questions Presented, and Facts.

e statement under which the jurisdiction of this Court
voked, of the questions presented, and the factual
er relevant to this application appear in the petition
hich this brief is annexed.

lotion for re-argument denied by the Court of Appeals with-
pinion, June 14, 1944.

Argument.

Petitioners urge that they have been convicted for the crime of murder, and have been sentenced to death as a result of a trial so violative of their constitutional rights as to be a denial to them of the protection of the Fourteenth Amendment of the Constitution of the United States in that they were denied due process of law.

The basis of their contention may be stated in the language of this Court in *Brown v. Mississippi*, 297 U. S. 278, 286:

> "The complaint is not of commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial."

POINTS.

I.

The admission in evidence of Malinski's confession was a violation of the rights of the petitioners under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The question involved herein is whether the confession of Malinski, on the 27th day of October, 1942, was made under such circumstances as to render it inadmissible under the applicable decisions of this Court, and the due process clause of the Fourteenth Amendment. It is the confession taken on October 27th, by a stenographer at 2:10 A. M., at the Bath Beach station house, with which this Court alone is concerned. While there is testimony that Malinski had made "complete confessions" prior thereto, no attempt was made to prove what Malinski said when

the alleged "complete confessions" were made, and there is no evidence of any admissions made by him at any other time after his apprehension on October 23, 1942, and his detention *incommunicado* in the Hotel Bossert from which to predicate a conclusion that he had confessed; nor was any effort made to prove any admission by him which would constitute a confession.

Whether there is other evidence in the record sufficient to sustain the verdict, regardless of the confession, to which objection was made, is immaterial. If the admission of the confession denied a right to the defendants under the Constitution, such an error requires reversal.

Bram v. *United States*, 168 U. S. 532, 533, 540-42; *Lyons* v. *Oklahoma*, 88 L. ed., Adv. Op., No. 16, 1076.

While there is a conflict in the testimony as to whether Malinski was beaten while in custody to procure a confession, there are certain conceded and undisputed facts which clearly and conclusively establish that the confession was extorted as the result of coercion, duress and illegal acts and conduct by the police and prosecuting officers, which violated the constitutional rights of the petitioners.

It is not denied that Malinski was assaulted by two individuals, subsequently identified as police officers, about 7:15 A. M. on October 23, 1942, immediately after leaving his home, where he was living with his family, and on his way to work. Two strangers "jumped" him, put pistols to his head, put handcuffs on him, told him to keep silent, when he asked if he were being kidnapped, put him into a private automobile and drove away from the vicinity of his home. It is not only not denied, but it is conceded, that he was taken to a private hotel, immediately stripped naked and kept wholly unclothed, and later partially clothed for a considerable time. It is admitted that numerous (21) skin graftings were found on his chest and abdomen. The testimony is contradictory as to whether he was beaten while in custody, and whether the police

threatened, while he was partially dressed, to throw him out of a window. It is conceded that he complained of illness and asked for a doctor and none was furnished. It is conceded that he asked to see a Rabbi and an assistant district attorney, and that his requests were denied. It is admitted that he was held *incommunicado* from the time of his arrest at 7:15 A. M. on October 23, until 5:30 A. M. on October 27—a period of four days; that during the time of his detention he was continuously questioned, day and night, by police officials and representatives of the district attorney's office, and that at 2:10 A. M. on the 27th of October, he was questioned; that the questions and his answers were taken by a stenographer, and that he was then "booked" and formally placed under arrest at 5:30 or 5:45 A. M., practically four days after being taken into custody.

The purpose of these proceedings is not a matter of conjecture or speculation. There is neither dispute nor controversy as to the underlying motive of the police and the public prosecutor, and the result sought.

> "Nonetheless," said Chief Judge Lehman, in the dissenting opinion, "in this case, as in People v. Mummiani (258 N. Y. 399, 400), 'the conclusion is inescapable' that the police delayed the arraignment of the defendant, 'for the purpose of subjecting him to inquisition impossible thereafter' at which time he might be induced to make a confession by resort to what the Supreme Court of the United States has described as 'those reprehensible practices known as the "third degree," which, though universally rejected as indefensible, still find their way into use.'"

The mere recital of the facts set forth herein should suffice to establish that the confession was the result of coercion and duress, and was not voluntary. But the petitioners do not rely only upon the foregoing narrative to

ustain their contention that there was a flagrant denial f constitutional rights.

In his summation, the district attorney said:

> "Why this talk about being undressed? Of course they had a right to undress him to look for bullet scars, and keep his clothes off him. That was quite proper police procedure. That is some psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner; let him think he *was going to get a shellacking*" (Rec., p. 128). (Italics supplied.)

In what plainer terms could an admission be couched that the practices to which the police had resorted were solely to produce such a mental state as to induce the defendant to make any statement desired so as to be relieved of the pressure? And does not such a frank admission of coercion tend rather to strengthen Malinski's claim that he was subjected to physical abuse as well as to mental terror?

Again, the district attorney said:

> "Malinski was held and he was allowed to sleep there.* He could not get away. When McNally was asked, 'did you place him under arrest?', he probably meant he did not book him right away. *They hold men for several days.*† Are you satisfied with that? They are not going to let him go home, or let him get hold of a smart mouthpiece to preach about his rights and to sue out writs. You want a district attorney who is worth his salt, not a powder puff district attorney. When you are trying a case of murder, especially murder of a police officer, you don't go over and give him a pat on the back and

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* Referring to Malinski's detention at the Hotel Bossert.

† Such action is in violation of the New York statute—§ 165 of the Code of Criminal Procedure, *ante*, p. 10.

> say: "Do you want anything? Do you want to have your lawyer, or your wife, or somebody else?" In fact after they would not let him see Mr. Math, an assistant in our office, they would not let him talk to a Rabbi. Do you think that McNally, 17 years in the Police Department, is going to let this jerk from the East Side tell him his business?" (Rec., p. 1254).

In view of the long and historical struggle to establish and protect fundamental rights which are sacred to Anglo-Saxon civilization can a more shocking and incredible statement be imagined?

Commenting upon the foregoing, and other passages in the district attorney's summation, Judge Conway, in the prevailing opinion (292 N. Y. 360, 373), said:

> "The remarks were indefensible."

Chief Justice Lehman, in the dissenting opinion, said (389):

> "We are loathe to believe that the police did actually act as the Assistant District Attorney says they did. We certainly cannot say that they did not do so, and we should not hesitate to reverse a judgment which is the result of a trial at which a jury was led to believe that such practices were lawful and proper."

A further excerpt is as follows:

> "Just imagine! Down there on that bleak, winter's night, Patrolman Fox trying to do his duty in the face of these hoodlums who were out there in Coney Island from the lower east side of Manhattan, *where your life is not worth a pretzel.*" (Emphasis ours.) (Rec., p. 1258).

It is a notorious fact of common knowledge, that in the region of the City of New York, usually referred to as the "East Side," there are hundreds of thousands of Jewish

people. They are decent, thrifty, industrious, law-abiding and patriotic. Of course some of the residents of that section at times commit crimes and are in conflict with law. It is not an uncommon thing for attempts to be made to create the impression that all of the inhabitants of the East Side are criminals, and because of their race and religious beliefs are an undesirable element of the community. The whole tenor of the "indefensible" remarks of the assistant district attorney was a brazen appeal to racial and religious prejudice, highly prejudicial to these defendants—both of whom are Hebrews—designed to have the jury convict defendants because of their race rather than on the evidence.

The Court was in agreement as to the outrageous and inexcusable character of the assistant district attorney's statements.

The majority took the position that although counsel had interrupted the summation a number of times, that they were so little impressed by the offensive character of the remarks, they made no objection to them. Chief Judge Lehman pointed out, however, that exception was taken by motion for a mistrial. Under the practice in New York State, in a capital case it is not essential for review by the Court of Appeals that an exception be taken. The Court has power to reverse for error, whether any objection be made or exception be taken.* But the question was not, as Judge Conway seemed to assume, whether the remarks were such as to impress counsel with their impropriety. The important question is, were they harmful to the defendants? If they were, it was the duty of the Court to give such relief to the defendants as the situation required.

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* Section 528 of the New York Code of Criminal Procedure is in part as follows: "* * * When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence, or against the law, or that justice requires a new trial, whether any exception shall have been taken in the court below."

Moreover, the Trial Court was not without responsibility in the premises. It was under an obligation to act. The trial judge is not supposed to act the Sphinx. His duty is not passive—it is affirmative. He is there not only to preside, but to see that the trial is conducted fairly and impartially and in accordance with the fundamental concepts of fairness and justice. This Court, in *Viereck* against the *United States*, *supra*, commenting upon certain remarks of the prosecuting attorney said:

> "In his closing remark to the jury, he—the prosecuting attorney—indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice. The trial judge overruled, as coming too late, petitioner's objection first made in the course of the Court's charge to the jury. * * * We think the trial judge should have stopped counsel's discourse, without waiting for an objection."

In *N. Y. C. R. Co.* v. *Johnson*, 279 U. S. 310, 316, 318, the following appears:

> "The public interest requires that the Court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion and prejudice."

In *People* v. *Wolf*, 183 N. Y. 464, 472:

> "An unfair trial especially in a criminal case, is a reproach to the administration of justice, and casts grave responsibility not only upon the prosecuting officer but also upon the trial judge. * * * we have repeatedly laid down the rule governing prosecuting officers in addressing the jury and to govern trial judges also in their duty relating to the subject. We have repeatedly admonished both, the former at times with severity and the latter more mildly, not to depart from that rule, but our admonitions have not

always been regarded, although they were followed by reversal of the judgment involved, founded solely on the remarks of the prosecuting officer and the failure of the trial judge to do his duty in reference thereto."

Cf.

People v. *Esposito*, 220 N. Y., 370;
People v. *Manganaro*, 218 N. Y., 9, 17;
People v. *Mull*, 167 N. Y., 247;
People v. *Fielding*, 158 N. Y., 542.

In *People* v. *Conroy*, 200 N. Y., 356, 369, considerable adverse testimony had been elicited in the cross-examination of the defendant and subsequently stricken out by the Trial Court. The Court of Appeals said:

> "It is not always an easy thing for a jury to eliminate from his memory the effect of damaging statements made in his presence. * * * In this case, where the defendant's life is involved, we are unwilling to take the responsibility of saying that the statements and charges of Monat erroneously received, although stricken out, did not affect the result."

The Trial Court did not interrupt the District Attorney at any time during his "indefensible" remarks, nor did he at any time or in any manner point out in his charge the objectionable and inexcusable character of them, and advise the jury to disregard them and not to be influenced by them. Whatever prejudicial impression the remarks may have made upon the jury no attempt was made to eradicate the improper impression by the one whose duty it was to prevent such results.

This Court has emphatically and in no unmistaken terms condemned such conduct by the prosecuting attorney.

In *Berger* v. *U. S.*, 295 U. S. 78, 88, Mr. Justice Sutherland, speaking for the Court, said:

> "The United States attorney is the representative not of an ordinary party to a controversy, but of a

> sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interests, therefore, in a criminal prosecution, is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that the guilty shall not escape or innocent suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

This language was quoted with approval in *Viereck* v. *U. S.*, *supra*.

Again, let us quote from the remarks of the district attorney:

> "Of course they had a right to undress him to look for bullet scars, and keep his clothes off him. That was quite proper police procedure. That is some psychology—let him sit around with a blanket on him, humiliate him there for a while; *let him think he was going to get a shellacking.*" (Italics ours.) (Rec., p. 1283.)

As said in *People* v. *Pantano*, 239 N. Y. 416, 419:

> "A threat may be implied as well as expressed and the fear engendered is alike in each case."

The assistant district attorney frankly boasted that the procedure adopted was intended to instill a belief that physical force was to be applied to Malinski. Under the circumstances, the mental condition resulting was the same as if the force were actually used. While there is contradictory testimony as to whether physical force was actually applied, there is no dispute that the procedure followed was intended to have the same effect.

In *United States* v. *Mitchell*, 88 L. ed., Adv. Op., No. 13, 812, 815 (decided April 24, 1944), Mr. Justice Reed said:

> "As I understand McNabb v. United States, 318 U. S. 332, as explained by the Court's opinion today, the McNabb rule is that where there has been illegal detention of a prisoner, joined with other circumstances which are deemed by this Court to be contrary to proper conduct of Federal prosecutions, the confession will not be admitted. * * * In my view, detention without committment is only one factor for consideration in reaching a conclusion as to whether or not a confession is voluntary. The juristic theory under which a confession should be admitted or barred is bottomed on the testimonial trustworthiness of the confession. If the confession is freely made, without inducement or menace, it is admissible. If otherwise made, it is not, for if brought about by false promises or real threat, it has no weight as proper proof of guilt."

While it is recognized that the rule in the *McNabb* case, *supra*, thus interpreted applies only to cases in the Federal Courts, and the power to review cases in State Courts, is more restricted and limited (*McNabb* v. *United States*, *supra*), yet the petitioners herein contend that there is here both conceded illegal detention and coercion and duress of the most flagrant character.

The Defendants Having Seasonably Asserted That Their Constitutional Rights Have Been Denied Resulting in a Judgment of Death, This Court Is Required to Make an Independent Examination to Ascertain Whether the Convictions Have Resulted From the Use of Confessions Improperly Obtained.

The petitioners have seasonably asserted their rights. The amended remittitur of the New York Court of Appeals sets forth that defendants' claim that they were denied due process of law under the Fourteenth Amendment was raised and

necessarily passed upon by that Court (*ante*, p. 2).* The record on appeal to the Court of Appeals discloses that the questions were raised on the trial in the Court below (*ante*, pp. 2, 3).

This being a capital case this Court is not bound by the finding of the Court, or the jury, or of both. It is under the solemn duty to make an independent investigation to determine the facts for itself.

In *Chambers* v. *Florida*, 309 U. S. 227, 228, it is said:

> "* * * use by a state court of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means prescribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners confessions were so obtained by review of the facts upon which that issue necessarily turns."

In *Lisenba* v. *California*, 314 U. S. 219, 240, it is said:

> "* * * we think it right to add that when a prisoner held incommunicado is subjected to questioning by officers for long periods and deprive of the advise of counsel, we shall scrutinize the record with care to determine whether, by use of his confession, he is deprived of his liberty or life through tyrannical or oppressive means."

In *Pierre* v. *Louisiana*, 306 U. S. 354, 358:

> "* * * when a claim is properly asserted * * * that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under the law rests."

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* 292 N. Y. 686, Adv. Sh., 274.

In *Ward* v. *Texas*, 316 U. S., 547, 550, the Court said:

> "Each State has the right to prescribe the tests governing the admissibility of a confession. In various States there may be various tests. But when, as in this case, the question is properly raised as to whether a defendant has been denied the due process of law guaranteed by the Federal Constitution, we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission amounts to a denial of due process."

In *Ashcraft* v. *Tenn.*, 88 L. ed., Adv. Op., No. 14, 858, speaking of the duty of the Supreme Court to make an independent examination to determine whether a confession was voluntary, the Court said:

> "Our duty to make that examination could not have been foreclosed by the finding of a court, or the verdict of a jury or both."

Considering the circumstances under which Malinski's confession was obtained, as hereinbefore set forth, the language of this Court in *White* v. *Texas*, 310 U. S. 530, 533, is peculiarly pertinent:

> "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."
>
> *Chambers* v. *Florida*, 309, U. S. 227, 288.

In *Betts* v. *Brady*, 316 U. S. 455, 462, it is said:

> "Due process of law is secured against invasion by the Federal Government by the Fifth Amendment and is safeguarded against state action in identical words in the Fourteenth Amendment. The phrase formulates a concept less rigid and more fluid than

those envisaged in the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of the facts in a given case."

In the instant case every device condemned by this Court as obnoxious to the Constitution were all employed to obtain Malinski's confession. Summarized they are: arrest without warrant; an assault with firearms; threats to keep silent; a spiriting away to a hotel, instead of a jail, during which numerous police stations, police headquarters, the County Court House and district attorney's office were passed; stripped naked, upon a flimsy pretext that it was desired to ascertain if there were bullet wounds or scars twenty months after the affray; held incommunicado from 7:15 A. M. October 23rd until 2:10 A. M. October 27th; repeatedly questioned day and night; denied medical attention when requested; denied opportunity to consult a Rabbi or an assistant district attorney, with the conceded purpose of preventing advice or assistance from friends and counsel—the only thing disputed being physical violence—mental coercion being conceded. What more could be done, or must be done, to establish that a confession is involuntary?

To use Mr. Justice Holmes illuminating expression the petitioner was subjected to a pressure that can only be properly characterized as "hydraulic".

Northern Securities v. *United States*, 193 U. S., 197, 400:

> "The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or to deny a suspected participation in a crime. * * * When concealed facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands."

> (Mr. Justice Reed, in *Lyons* v. *Oklahoma*, 88 L. ed., Adv. Op., No. 16, 1076.)

As to Failure to Arraign Without Unnecessary Delay.

In a note, page 10, *ante*., Section 165, of the New York Code of Criminal Procedure, requiring a defendant to be taken before a Magistrate without unnecessary delay is set forth.

Somewhat similar statutes govern federal procedure.†

Arraignment of the defendant herein without "unnecessary delay" was a question of law to be determined by the Court. A jury may not speculate upon the motives of the police in failing to arraign promptly. There may be situations where there is unavoidable delay, *i.e.*, inability to locate a magistrate or illness of the prisoner. It is a matter of common knowledge, however, that in the City of New York, magistrates are always available. They sit every day. There are night courts held by them. No issue was presented that magistrates were not available during the period of detention. The purpose of delaying arraignment in order to secure a satisfactory confession was conceded. It was the duty of the Trial Court to advise the jury as a matter of law that the failure to arraign Malinski from the time of his arrest on October 23rd until October 27th, was a flagrant violation of law. The Court did not do so.

The charge on that question is as follows:

> "* * * I charge you that it was the duty of the police to arraign the defendant before the nearest magistrate without unnecessary delay, and, further,

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† "It shall be the duty of the marshall, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner, or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail" (18 U. S. C. A., Sec. 595).

The Act of June 18, 1934, c. 595, 48 Stat. 1088; 5 U. S. C. A., sec. 300 A, authorizing officers of Federal Bureau of Investigations to make arrests, requires that, "the person arrested shall be immediately taken before a committing officer".

that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor.

But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made, was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession, if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27, at the Bath Beach station house.

However, I am charging you that the failure to arraign in and of itself, is not conclusive against the People, and does not of, and in itself, standing alone, destroy the validity of the confession. Is that clear?"

It is respectfully submitted that the charge was erroneous and grossly inadequate. It was not for the jury to speculate as to whether there had been "unnecessary delay", in the arraignment. The fact was so overwhelmingly established, that the jury should have been so advised. They should have been further instructed that such a flagrant violation of law on the part of the police *must* be seriously and carefully weighed in determining whether the confession of October 27th was voluntary. It should have been pointed out that only after repeated questioning, day and night, for four days, did the police obtain such a confession as they were willing to have transcribed. The jury should have been told to consider well whether the delay in arraignment was to obtain the sort of confession desired and necessary to involve Malinski. As Chief Judge Lehman pointed out *(ante*, p. 20) that "the conclusion is inescapable that the police delayed the arraignment for the purpose of subjecting the defendant to pressure thereafter impossible". Moreover, the charge minimizes the importance of a prompt arraignment of a perisoner and must have been exceedingly

misleading to the jury. As Chief Judge Lehman said (292 N. Y. 360, 387):

> "There can be no fair trial of the crime whether the confession is voluntary, where the jury is not properly informed that the detention was unlawful and they must take that fact into consideration. *It has not been done in this case.*
>
> It is true that in the charge of the Court, the jury was informed that 'it was the duty of the police to arraign the defendant before the nearest magistrate, without unnecessary delay, and further if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor, and if you find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski including the one made in the early hours of October 27th, at the Bath Beach Station House. That instruction is not sufficient where, as in this case, the evidence produced by the People, conclusively shows that the police flagrantly disobeyed the express mandate of the law. Even if there had been a question in this case, that the delay in arraignment was not "unnecessary" within the meaning of section 165 of the Code of Criminal Procedure, that question was not properly submitted to the jury'."

No clearer analysis of the circumstances under which the issue of whether the voluntary nature of the confession was adequately and properly submitted to the jury is possible. The jury was never properly instructed on the applicable law; it was impossible to have an intelligent discussion and decision under the circumstances.

Controlling Decisions.

This case comes squarely within *Ashcraft* v. *Tenn.*, *supra*. There is a striking similarity between the cases. It would serve no useful purpose to detail at length the facts established in the *Ashcraft* case. Suffice to say that there ap-

peared to have been continuous questioning by experienced lawyers and police officials; that he was held incommunicado for thirty-six hours without sleep or rest. "The Constitution of the United States stands as a bar", said the Court, "against the conviction of any individual in an American Court by means of coercion".

The conceded and proven facts in the instant case, hereinbefore specifically set forth, disclose a situation more flagrant and indefensible than that shown in the *Ashcraft* case. No novel rule is asserted by the petitioners. Their rights under the Constitution have been unlawfully invaded. They invoke its protecting aegis, that their lives may not be forfeit by such unconscionable and vicious practices as were indulged in herein.

Other decisions that support petitioners' contentions and justify the writ sought are:

Ward v. *Texas*, 316 U. S., 547;
Lisenba v. *California*, 314 U. S., 219;
Chambers v. *Florida*, 309 U. S., 227;
White v. *Texas*, 310 U. S., 530;
Vernon v. *Alabama*, 313 U. S., 547;
Lomax v. *Texas*, 313 U. S., 544;
Canty v. *Alabama*, 309 U. S., 629;
Brown v. *Mississippi*, 297 U. S., 278;
Pierre v. *Louisiana*, 306 U. S., 354;
Betts v. *Brady*, 316 U. S., 455;
Lyons v. *Oklahoma*, 88 L. ed., Adv. Op., No. 16, 1076.

Conclusion.

The killing of patrolman Leon Fox was a dastardly inexcusable, abhorent murder. Its perpetrators should be punished. They deserve no sympathy, they should receive no mercy. The wisdom of the maxim "*Justitia fiat, ruat coelum*" is neither challenged nor deprecated. Considering the present world-wide abnormal conditions punishment for crime should be swift and exact. Convictions, however, should be in accordance with law. The fathers wrought

better than they knew when they incorporated those invaluable safeguards for the life and liberty of our people which are found in the Constitution. Inherent in our criminal procedure are definitely recognized foundamental concepts of justice, fairness and impartiality, precious to our Anglo-Saxon civilization, which cannot be evaded merely to secure victims for punishment. The law instinctively looks upon confessions by the accused with suspicion. The methods frequently used to obtain them, in violation of constitutional rights, are too well known, and have been so often and emphatically condemned by this and other courts, as to require no enumeration. The Nazi system of justice, with its concomittant methods of inducing confessions, has no place in our jurisprudence and should never be given a beachhead.

A calm and dispassionate examination of the record herein, and of the circumstances under which Malinski's confession was procured, disclose a process abhorent to those foundamental concepts of fairness and justice, characteristic of our criminal procedure, and repellent to every element of impartiality.

Important it is indeed to punish crime; but far more imperative is it that our criminal procedure be not polluted with foreign methods, alien to our concept of justice and inconsistent with our system of government.

So conclusively apparent does the record disclose an invasion of the petitioners' rights under the Fourteenth Amendment, that the intervention by this Court to prevent a gross miscarriage of justice, and the execution of petitioners as a result of practices condemned by it, is imperative.

We respectively pray that the petition for certiorari be granted.

Respectfully Submitted,

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Counsel for Petitioners.

Appendix A.

United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B.

Judicial Code of the United States, Section 237 (b), as Amended, 28 U. S. C. A., Section 344 (b).

It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United

States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

Appendix C.

Section 165 of the Penal Law of the State of New York.

The defendant must in all cases be taken before the magistrate without unnecessary delay.

Appendix D.

Section 399 of the Code of Criminal Procedure of the State of New York.

A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

Appendix E.

Section 1844 of the Penal Law of the State of New York.

A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such a person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

Appendix F.

Section 528 of the Code of Criminal Procedure of the State of New York.

When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence, or against the law, or that justice requires a new trial, whether any exception shall have been taken or not in the Court below.

Appendix G.

Section 595, United States Code of Criminal Procedure, Title 18, United States Code (1940 Ed., Vol. 2).

It shall be the duty of the Marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under the existing laws for a hearing, commitment, or taking bail for trial. * * *

Appendix H.

Section 300 A of Title 5, United States Code (1940 Ed., Vol. 1, p. 124).

The Director, Assistant Directors, agents, and inspectors of the Division of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Division of Investigation of the Department of Justice are authorized and empowered to carry firearms.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 367

MORRIS MALINSKI AND SIDNEY RUDISH,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONERS

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With Them on the Brief.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 367

MORRIS MALINSKI AND SIDNEY RUDISH,
Petitioners,
against
THE PEOPLE OF THE STATE OF NEW YORK,
Respondents

BRIEF ON BEHALF OF PETITIONERS

On certiorari to the Court of Appeals of the State of New York.

The petitioners were convicted in the County Court of Kings County of the State of New York of the crime of murder in the first degree and sentenced to be put to death. The judgment was affirmed by the Court of Appeals.

Opinions Below

The two opinions written in the Court of Appeals of the State of New York are reported officially, 292 N. Y. 360. The denial of the motion for reargument is reported officially, 293 N. Y. 695.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of

February 13, 1925, c. 229, section 1 (43 Stat. 937); 28 U. S. C. A. Section 344 (b),[1] this being a proceeding to review the final judgment of the Court of Appeals of the State of New York rendered April 20, 1944, in which a decision could be had.

The judgment affirmed a judgment of death (Rec. pp. 91-92; 95-96); and in said Court of Appeals petitioners especially set up and claimed under the Fourteenth Article of Amendment of the Constitution of the United States,[1a] the right, privileges and immunity against being deprived by the State of New York of petitioners' rights and liberty without due process of law, "and this point was considered and necessarily decided by this Court", (292 N. Y. 686). This point having been specifically presented in the briefs on behalf of Malinski and Rudish, on the argument of the appeal from the judgment of conviction and death of the County Court of Kings County, New York State, and specifically in the trial.

Statement of the Case

The petitioners and one Joseph Indovino were convicted of murder in the first degree, in the County Court, Kings County, New York State, on July 19, 1943, and your petitioners were sentenced to be executed.[2] (Rec. pp. 91-92; 95-96).

The conviction was affirmed by the Court of Appeals by a divided Court.[3] The jury recommended life imprisonment for Indovino (Rec. pp. 1417), so that his case was not passed upon by the Court of Appeals, and is not involved here (292 N. Y. 360, 364).

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[1] Appendix B, *post* p. 45.

[1a] Appendix A, *post*, p. 45.

[2] A stay of execution was granted by Mr. Justice Jackson by order dated June 19, 1944, and continued by Order of the Court, dated October 9, 1944.

[3] The Court divided four to three.

A motion for a reargument in the Court of Appeals was denied without opinion June 14, 1944. (293 N. Y. p. 695).

There were two opinions written in the Court of Appeals. The prevailing opinion was by Judge Conway, concurred in by Judges Lewis, Desmond and Thatcher (292 N. Y. 360); a dissenting opinion was filed by Chief Judge Lehman and concurred in by Judges Rippey and Loughran (i. d., 376).

Questions Involved

The issues to be determined are:

(a) Were the circumstances under which a confession was obtained from Malinski and put in evidence a denial of due process under the Fourteenth Amendment?

(b) Did the conduct of the prosecuting attorney and his summation to the jury constitute such a violation of the fundamental concepts essential to a fair and impartial trial, as to constitute a denial of due process under the Fourteenth Amendment?

(c) Did the conduct of the judge, his charge, and his failure to charge fully and intelligently on certain phases of the case constitute a denial of due process under the Fourteenth Amendment?

Certificate of Court of Appeals

The amended remittitur of the Court of Appeals (292 N. Y. 686) explicitly recites that both Malinski and Rudish had raised questions under the Constitution of the United States, which had been presented to that Court and necessarily passed upon (292 N. Y. 686).

Details of the Crime

On February 15, 1941, at eleven o'clock, P. M., Leon Fox, a patrolman of the Police Force of the City of New York,

was shot and killed. At the time of the homicide he was escorting the manager of Loew's Theatre in Coney Island, Borough of Brooklyn, City and State of New York, to a bank depository. The manager had the day's receipts of the theatre, consisting of seven hundred dollars in bills, and seven rolls of quarters of ten dollars each in a burlap bag. As they approached the depository, a branch of the Brooklyn Trust Company, located at Surf Avenue and West 12th Street, Coney Island (Rec. pp. 127-128), they noticed an automobile parked on West 12th Street, south of Surf Avenue, with the lights out and the motor running. As they reached the vicinity of the car, they were "jumped" by one man, who came out of the automobile; the officer was shot; the bag containing the money taken; the man entered the car, which sped away at a high rate of speed. None of the occupants of the car, nor the participants in the robbery and killing were ever identified (Rec. pp. 129-132). The testimony against the defendants was given chiefly by David Yellin,[4] Nathan or Slip Spielfogel[4a] and Samuel Koyner,[5] three criminals then serving time in States Prison.

The indictment is as follows:

> "The Grand Jury of the County of Kings, by this indictment, accuse the defendants of the crime of Murder in the First Degree, committed as follows:
>
> The defendants, on or about February 15, 1941, in the County of Kings, acting in concert with Abraham Beitler, deceased,[6] wilfully, feloniously and of malice aforethought, shot and killed Leon Fox, with a pistol" (Rec., p. 11).

[4] Yellin was serving a term of from 10 to 20 years, for a "stick-up", convicted December 12, 1941 (Rec., p. 221).

[4a] Spielfogel, as a second offender was under sentence of from 30 to 60 years, for complicity in the same "hold-up" in which Yellin was convicted (Rec., pp. 295, 246).

[5] Koyner was serving a term of from 15 to 30 years for a "stick-up" committed December 15th, 1940 (Rec., p. 679).

[6] Beitler was dead at the time of the trial (Rec., pp. 679-681).

The only testimony against the petitioner Rudish, was given by Yellin and Spielfogel (Rec., pp. 221-288; 295-447).

The incriminating testimony consisted very largely of conversations alleged to have been had between Beitler, Yellin and Indovino; Beitler, Indovino and Kovner; Malinski and Spielfogel; and Rudish, Spielfogel and Yellin. The conversations related largely to the planning of the robbery, and those between Rudish and Yellin, and Rudish and Spielfogel as to Rudish's alleged participation in the affair —all of such conversations having occurred immediately prior, or subsequent, to the homicide (Rec., pp. 221-228; 315-320).

The witness Yellin was held to be an accomplice as a matter of law (Rec., p. 1347).

The Court of Appeals divided, four to three, on whether Spielfogel was an accomplice. The majority of the Court held that whether he was an accomplice was properly submitted to the jury as a question of fact (292 N. Y. 360, at 376); the minority insisted that the evidence established him to be an accomplice as a matter of law, or if not, that the evidence overwhelmingly proved him to be so as a matter of fact (292 N. Y. 360, at 380).

If Spielfogel were an accomplice, Rudish's conviction could not stand, since in New York State a conviction cannot be had upon the uncorroborated testimony of an accomplice.[7]

Circumstances Under Which Confession Obtained

The testimony established that on October 23, 1942, Morris Malinski was living with his family at 714 Hinsdale Street, Brooklyn, N. Y. (Rec., pp. 548; 945). He left his

[7] Section 399 of the New York Code of Criminal Procedure provides that "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

home shortly after 7 A. M. that morning to proceed to work. When he had gone a short distance, he was accosted by two men who put pistols to his head. He was handcuffed, taken to an automobile, placed in it and driven away. He asked if he were being kidnapped and told to keep still. He was driven to the Bossert Hotel, in Brooklyn, a distance of five or six miles. During the drive a number of police stations, police headquarters, the County Court of Kings County, and the office of the District Attorney of Kings County were all passed. No stop was made. The Hotel Bossert was reached at eight o'clock and Malinski was immediately taken to a room where Lieut. McNally was present. Malinski was immediately stripped naked. (Rec. p. 574).[5]

After being stripped naked at the Bossert Hotel he was kept that way for a while, and then given his BVD's. Later he was given a blanket. The testimony is conflicting as to the length of time he remained undressed (R. 587-588, 607; 595-596); but one officer attached to the district attorney's office, testified that he was still in his stripped condition when he returned to the room in the Bossert Hotel at 3:00 A. M. Saturday morning, October 24th (R. 595-596). The reason assigned by the police for stripping Malinski was to ascertain whether there were any bullet wounds or scars on his body (R. 584), although the homicide had been effected twenty months previously (R. 11-12). What was found on examining Malinski's body was evidence of twenty-one skin graftings on his chest and abdomen, necessitated by severe burns when he was a child (R. 551, 596).

Malinski also testified that while he was still stripped

[5] Malinski claims by force; the police say he undressed voluntarily (Rec., pp. 549; 574; 595; 605-606).

Under cross-examination Lieut. McNally was asked:

"Q. Did you immediately commence interrogating the defendant Malinski? A. I stripped him first.

Q. Did you then interrogate him? A. I did." (Rec. 574.)

he was taken to an open window, his clothes placed on the window sill and that the police threatened to throw him out the window (R. 551). This was denied by the police (R. 572).

As soon as Malinski was brought to the hotel, Lieut. McNally 'phoned Edward Heffernan, an assistant district attorney, who had been working on the case with the police. Malinski testified that during the afternoon, Heffernan came to the hotel and questioned him about the Fox killing and left in disgust because Malinski denied all knowledge of the affair (R. 550). Lieutenant McNally testified that Heffernan came to the room where Malinski was, was told who he was, looked at him and walked out without speaking to him (R. 576). Another highly improbable story—that the public prosecutor, notified of the arrest of a suspect in a murder case on which he was working, merely looked at the suspect and did not question him at the earliest opportunity. Although Heffernan was present in the court room at the trial he was not called as a witness (R. 325-326). Malinski claimed that the police had beaten him from time to time during the day, Friday, October 23, 1941 (R. 549, 551, 555, 557-558). The police denied it (R. 572, 592, 604, 615). Some time in the course of the day, about 5 or 6 o'clock in the afternoon, it is claimed that Malinski made a full confession (R. 576). No transcript was made of any such confession; nor was any attempt made to prove the details of it. Later in the evening, about 9 o'clock, Malinski was questioned in the presence of the Acting District Attorney, Thomas Craddock Hughes, Assistant District Attorney Heffernan, Captain McGowan, head of the Homicide Bureau of the Police Department; Captain Dowdell, and Lieutenant McNally. No record was made of any statements made at that time by Malinski. None of the persons mentioned as being present at that time, ever denied his

presence or that what Malinski testified had occurred there had never happened (R. 851). Nor did any of them testify to any of the details of the confession which it is contended Malinski made at that time. The following day, Saturday, October 24, 1942, Malinski complained of illness and asked for a doctor (R. 562). His request was refused (R. 563). He also requested permission to see a Rabbi, and an assistant district attorney named Nat Math; both requests were refused (R. 322, 1254). Some sort of medicine or drug was given to him by one of the police officers to alleviate the stomach condition of which he complained (R. 596). He was questioned all day Saturday and into the night. The following day (October 25, 1942) he was questioned further and eventually taken to a police garage. It is claimed by the People that he there identified the car which had been used in the affair. He denied doing so, and his conduct substantiates his claim.[2]

He was questioned further and at length on that and on the following Monday, when he was taken to the scene of the crime (R. 644). All of this time he was held *incommunicado* in the Bossert Hotel. When Lieut. McNally was asked why, if the police had a complete confession at about five or six o'clock on Friday, October 23rd, that Malinski had participated in the brutal killing of a fellow member of the police department, he was not locked up in jail, McNally answered that Malinski had remained at the hotel of his own volition. That he was given the choice of going to jail or remaining at the hotel, and he chose to remain at the hotel with his "pal," Spielfogel, although Spielfogel

[2] He was asked to open one of the doors of an automobile claimed to have been the one used. He took his handkerchief from his pocket and grasped the handle with his handkerchief, asking at the same time whether the police were trying to "frame" him by inducing him to do something which would leave his finger prints on the car (R. 949-959).

was locked up in jail every night (R. 580-581), while Malinski was kept *incommunicado* in the hotel.

On Monday, the 26th, Malinski was questioned further and was taken in an automobile over the route alleged to have been followed by the killers to the scene of the crime. He was accompanied by detectives and Spielfogel.[10] The People contend that he voluntarily described the actions of the participants, preceding the killing and during the "stick-up" during which the homicide was effected. Malinski contends that the information furnished by him was given him by Spielfogel from time to time. That they conversed in Yiddish and that Spielfogel continually urged him to give the answers he suggested, as by so doing Malinski would avoid further ill treatment. About three o'clock in the afternoon of October 26, 1942, the party arrived at the Bath Beach or 62nd Precinct, station house. Malinski was questioned off and on until 2:10 A. M., October 27, 1942, when a statement then made by him as a result of questioning by Assistant District Attorney Heffernan, was taken by a stenographer, and later transcribed (R. 552-553, 579).[11] Then about 5:30 or 5:45 A. M., Tuesday morning, October 27, 1942, after having been held *incommunicado* from 7:15 A. M. of October 23, 1942, your petitioner, Malinski, was booked, or for nally placed under arrest by having a charge entered against him.[12]

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[10] Evidently the alleged "full confessions" were unsatisfactory and so the questioning was continued until one was obtained which met the requirements of the police.

[11] No explanation was ever given for taking Spielfogel on the trip.

[12] "The defendant must, in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night." (N. Y. Code of Criminal Procedure, Sec. 165).

Section 1844 of the Penal Law (N. Y.), provides that "A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

"If, as appears plain, they did 'arrest' the defendant Malinski, then his confinement by the police at the Hotel Bossert, or any other place, without prompt arraignment was contrary to the express command of the statute and was unlawful." (Opinion of Chief Judge Lehman, p. 382).

Lieut. McNally testified that Malinski was arrested Tuesday morning, October 27, 1942 (R. 580, 587), although he was taken into custody and held *incommunicado* from Friday morning October 23, 1942, until the 27th when McNally claims he was arrested.[13]

During the trial, Malinski testified in his own behalf and denied emphatically that the admissions in the alleged confession were true, or that he had participated in any manner whatsoever in the robbery and killing (R. 955, 956, 961).

In addition to the oppressive conduct of the police and prosecuting officers, there were other violations of petitioners' rights so highly prejudicial as to deprive them of a fair trial under the Fourteenth Amendment. For instance during the final address of the assistant district attorney remarks were indulged in of so highly a prejudicial and vicious character as to vitiate the trial. There is no dispute as to their indefensible character. All the Judges of the Court of Appeals are in agreement as to their objectionable character. Their impropriety was a denial of that

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In *People* v. *Mummiani* (258 N.Y. 394, 399), it was said:

"The police are guilty of oppression and neglect of duty when they wilfully detain a prisoner without arraigning him before a magistrate within a reasonable time (Code of Crim. Proc., Sec. 167). The conclusion is inescapable that they do this for the purpose of subjecting him to an inquisition impossible thereafter."

[13] "Malinski was taken into custody on October 23 (R. 573). Concededly, he was not arraigned before a Magistrate or 'booked,' until October 27 (R. 586-587). During this time he was in the custody of police officers at the Hotel Bossert, Brooklyn." (Brief in Opposition to petition for certiorari, p. 18).

fundamental concept of justice and fairness that are essential to a fair and impartial trial imperative under the Fourteenth Amendment. The remarks and their impropriety are full set forth and discussed hereinafter (post pp. 19, 20, 22).

As to Rudish

"The conviction of Rudish," said Chief Judge Lehman, in the dissenting opinion, "thus rests upon the testimony of two witnesses who are accomplices by the great weight of evidence. The Trial Judge charged that 'no other evidence' corroborates them. The verdict against Rudish should for that reason be set aside" (*Peo.* v. *Malinski*, 292 N. Y. 360, 380).

That statement evidences how vital to Rudish was the admission of evidence harmful to him. After proceedings on the *voir dire* to determine whether the alleged written confession of Malinski should be admitted and submitted to the jury, the Court decided to admit the confession. After some discussion, the Court directed that certain names should be deleted and in their places the designations "X" and "Y" be used (R. 618-620).

In the alleged confession, Malinski involved both Rudish and Indovino, and it was those names which the Court directed should be suppressed and for which "X" and "Y" should be substituted. The device was futile. As soon as Malinski was called to testify in his own behalf, a few questions by his counsel developed that "X" and "Y" were respectively Rudish and Indovino (R. 953, 962). As said in *Anderson* v. *United States*, Vol. 87, Law Ad. Op. 589, 592.

> "The government urges that, even if the confessions are held to be inadmissible, only the convictions of the six petitioners who confessed should be reversed. The prosecution rested principally on these confessions and the testimony of an informant, Freed Long, whose

credibility was under severe attack. The incriminating statement of each petitioner implicated all the others, including those who did not confess. *To be sure, the trial court devised a procedure under which the confessions were introduced without mention of the names of the other persons implicated. But their names were in fact revealed in the course of the cross-examination of the confessing petitioners.*" (Italics ours.)

However, as appears from the Record (p. 589) before Rudish and Indovino had been taken into custody the assistant District Attorney had introduced their names and gotten the fact before the jury that Malinski had implicated them.

"By Mr. McGough:

Q. On the day, (October 23) he (Malinski) finally told you at 5:30, had you apprehended Indovino and Rudish? A. No, sir.

Q. Were you or your men during that interval of three days working on the apprehension of those men? A. Yes.

* * * * * * *

Q. In other words, you were continuing your investigation; yes or no? A. Yes, sir."

The entire case emphasizes that Malinski's confession was fatal to Rudish. The indictment charged that Malinski, Rudish, Indovino and Beitler, then deceased, acting in concert, had killed Fox. In his opening address the District Attorney asserted that Malinski, Rudish and Beitler were at the scene of the crime; Indovino was not—he was the tipster. That Beitler thereafter had committed suicide. When Malinski's alleged confession was put in evidence with Rudish's and Indovino's names replaced by "X" and "Y", even without anything further it was inevitable that the jury should surmise that "X" and "Y" could only mean Rudish and Indovino. The case against all of the de-

fendants was interminably interwoven and connected, so that any evidence against any one of them, whether or not competent against the others, must necessarily have influenced the jury unfavorably against them. It is absurd to contend that merely because Rudish made no confession he has no standing here. If the confession of Malinski was a denial to him of due process, it is equally incompetent and as vitally disastrous to Rudish.

The only testimony against Rudish was given by Yellin and Spielfogel. Yellin was held to be an accomplice as a matter of law (*ante*, p. 5); the Court of Appeals divided sharply by four to three as to the status of Spielfogel (*ante*, p. 5). Spielfogel was under severe attack as to whether he had been an actual participant in the crime. The confession of Malinski must have had tremendous influence with the jury in determining Rudish's guilt. If it were wrongfully admitted, the conviction of Rudish should not be permitted to stand.

Argument

One question involved herein is whether the confession of Malinski, on the 27th day of October, 1942, was made under such circumstances as to render it inadmissible under the applicable decisions of this Court, and the due process clause of the Fourteenth Amendment. It is the confession taken on October 27th, by a stenographer at 2:10 A. M. at the Bath Beach station house and his identification of the murder car and his description at the scene of the murder with which this Court alone is concerned. While there is testimony that Malinski had made "complete confessions" prior thereto, no attempt was made to prove that Malinski said when the alleged "complete confessions" were made, and there is no evidence of any admissions made by him at any other time after his apprehension on October 23, 1942, and his detention *incommunicado* in the Hotel Bos-

sert from which to predicate a conclusion that he had confessed; nor was any effort made to prove any admission by him which would constitute a confession.

In the language of this Court in *Brown* v. *Mississippi*, 297 U. S. 278, 286:

> "The complaint is not of commission or mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial."

Whether the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider. The confession was introduced over the defendants' objection. If such admission of this confession denied a constitutional right to defendant the error requires reversal.

Lyons v. *Oklahoma*, 88 S. C. L. ed. 1076.
Bram v. *United States*, 168 U. S. 532, 533, 540-42.
c/f *Stromberg* v. *California*, 283 U. S. 359, 367, 368.
Williams v. *North Carolina*, 317 U. S. 287, 291, 292.

Such being the well settled rule of this Court, no attempt will be made to analyze the other evidence in the record, nor will any answer be made to the elaborate argument in the Brief in opposition to the petition for the writ of certiorari, that such other evidence establishes the petitioners' guilt regardless of the confession. If the confession was improperly admitted and a constitutional right denied, the Court will not attempt to evaluate the effect of the confession.

While there is a conflict in the testimony as to whether Malinski was beaten while in custody to procure a confession, there are certain conceded and undisputed facts which clearly and conclusively establish that the confession was extorted as the result of coercion, duress and illegal acts and conduct by the police and prosecuting officers.

It is not denied that Malinski was assaulted by two individuals, subsequently identified as police officers, about 7:15 A. M. on October 23, 1942, immediately after leaving his home, where he was living with his family, and on his way to work. Two strangers "jumped" him, put pistols to his head, put handcuffs on him, told him to keep silent, when he asked if he were being kidnapped, put him into a private automobile and drove away from the vicinity of his home. It is not only not denied, but it is conceded, that he was taken to a private hotel, immediately stripped naked and kept wholly unclothed, and later partially clothed for a considerable time. It is admitted that numerous (21) skin graftings were found on his chest and abdomen. The testimony is contradictory as to whether he was beaten while in custody, and whether the police threatened, while he was partially dressed, to throw him out of a window. It is conceded that he complained of illness and asked for a doctor and none was furnished. It is conceded that he asked to see a Rabbi and an assistant district attorney, and that his requests were denied. It is admitted that he was held *incommunicado* from the time of his arrest at 7:15 A. M., on October 23, until 5:30 A. M. on October 27—a period of four days; that during the time of his detention he was continuously questioned, day and night, by police officials and representatives of the district attorney's office, and that at 2:10 A. M. on the 27th of October, he was questioned; that the questions and his answers then put to him were taken by a stenographer, and that he was then "booked" and formally placed under arrest at 5:30 or 5:45 A. M., practically four days after being taken into custody.

The purpose of these proceedings is not a matter of conjecture or speculation. There is neither dispute nor controversy as to the underlying motive of the police and the public prosecutor, and the result sought.

What more conclusive evidence that the confession was the result of coercion and induced by threats could be furnished than the admission of the People. In the Brief in Opposition to the petition for certiorari it is said (p. 27):

> "Malinski says he was beaten; the police deny that; *the district attorney is candid enough to say that the police let him believe he was going to be beaten for the psychological effect such a mode of dealing with him might have upon him.*" (Emphasis supplied.)

Could the author of that admission have had in mind what was said in *Peo.* v. *Pantano*, 239 N. Y. 416, at 419; that

> "A threat may be implied as well as expressed and the fear engendered is alike in each case?"

What other conclusion is possible from the established and conceded facts than that stated in the dissenting opinion of Chief Judge Lehman, wherein he says:

> "Nonetheless, (p. 387) in this case, as in People v. Mummiani (258 N. Y. 399, 400), 'the conclusion is inescapable' that the police delayed the arraignment of the defendant for the purpose of subjecting him to inquisition impossible thereafter at which time he might be induced to make a confession by resort to what the Supreme Court of the United States has described as those reprehensible practices known as the 'third degree, which, though universally rejected as indefensible, still find their way into use.'"

The mere recital of the facts set forth herein should suffice to establish that the confession was the result of coercion and duress, and was not voluntary.

In the Brief in opposition to the petition for certiorari there is a brazen attempt to justify this illegal conduct of the police. At page 18 thereof is the following:

> "Malinski was taken into custody on October 23 (R. 573). Concededly, he was not arraigned before a

Magistrate of 'booked' until October 27 (R. 586-587). During this time he was in the custody of police officers at the Bossert Hotel, Brooklyn. He was kept there with his consent. According to Detective McNally, Malinski, when he was asked whether he preferred to remain there, instead of being lodged in a police cell, said his preference was the hotel. Also, according to McNally, when at five-thirty o'clock on the afternoon of the day of his arrest, Malinski, admitted his part in the killing, neither Indovino nor Rudish had been apprehended (R. 589). That this is so, is borne out by the testimony of Indovino that he was arrested on October 24 (R. 672), and of Rudish that he was arrested on the same day (R. 672).

During the interval of three days following Malinski's admission of guilt and his confession to assistant district attorney Heffernan, on October 27, the police officers were continuing their investigation of the case (R. 589). That is not an unreasonable explanation of the police officers' delay in arraigning Malinski. Particularly, it is not unreasonable if it was true that Malinski acquiesced in being kept at a hotel instead of being placed in a cell.

'In the absence of justification the detention for almost thirty-six hours was illegal and though the illegality does not require the inference that the confession obtained was involuntary, yet it has a substantial bearing upon that disputed question (People v. Alex., 265 N. Y. 192).'

Justification here appears. Of what avail would the information supplied to them by Malinski have been to the police if prompt arraignment followed disclosures of the afternoon of October 23, and his guilty partners were put on warning and thus allowed to escape?''

The following sentence, in that excerpt, is highly significant: ''Particularly, it is not unreasonable if it was true that Malinski acquiesed in being kept at a hotel instead of being placed in a cell.''

Is it possible to conceive that any one in possession of his mental faculties, in custody and charged with a heinous crime, having any hesitation in choosing whether to remain in a hotel or being put in jail? It was Lieut. McNally's plainly false and preposterous excuse for his failure to put Malinski in jail after he had allegedly admitted participation in the murder of Officer Fox. Malinski, said McNally, preferred to remain at the hotel to be with his pal, Spielfogel. Yet Spielfogel was locked up in jail every night. Was there ever such solicitation by the police towards an allegedly self-confessed murderer of one of their own members?

Unquestionably the assigned reason was false. Its falsity is shown by what occurred. Malinski was questioned on Friday night, after his alleged confession that day about 5:30 or 6:00 P. M., all day Saturday, Sunday and Monday until he finally made the confession stenographically recorded at 2:30 A. M., October 27, 1944. The real and sole purpose of keeping Malinski at the hotel, instead of putting him in jail, was to permit continued questioning while he was held *incommunicado* and to permit the application of coercive pressure until a satisfactory "confession" was extorted. As the District Attorney said in his summation, "They hold men for several days. * * * They are not going to let him go home, or let him get hold of a smart mouthpiece to preach about his rights and to sue out writs" (R. 1254). In the Brief in opposition to the petition for certiorari it is said (p. 18): "During the interval of three days following Malinski's admission of guilty and his confession to assistant district attorney Heffernan, on October 27, the police officers were continuing their investigation of the case." The statement is too naive. Only those still living in chidhood's innocence could possibly be misled by such reasoning. If Malinski had made a full confession at 5:30 or 6:00 P. M., on the 23rd of October, why the incessant

questioning thereafter till 2:30 A. M., October 27th. The conclusion is inevitable—there was no complete confession October 23rd, and the questioning was persisted in, without cessation, until one satisfactory to the police was coerced at 2:00 A. M., October 27th.

> "We are loathe to believe that the police did actually act as the Assistant District Attorney says they did. We certainly cannot say that they did do so, and we should not hesitate to reverse a judgment which is the result of a trial at which a jury was led to believe that such practices were lawful and proper." (Ch. J. Lehman, 392 N. Y. at 389.)

The petitioners, however, do not rely alone upon the foregoing narrative of events to sustain their contention that there was a flagrant denial of constitutional rights.

In his summation, the district attorney said:

> "Why this talk about being undressed? Of course they had a right to undress him to look for bullet scars, and keep his clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, *let him think he is going to get a shellacking*" (R. 1283). (Italics supplied.)

In what plainer terms could an admission be couched that the practices to which the police had resorted were solely to produce such a mental state as to induce the defendant to make any statement desired so as to be relieved of the pressure? And does not such a frank admission of coercion tend rather to strengthen Malinski's claim that he was subjected to physical abuse as well as to mental terror?

In *Lyons* v. *Oklahoma*, 88 Law Ed. Adv. Op. 1076 at 1079, it is said:

> "The voluntary or involuntary character of a confession is determined by a conclusion as to whether the

> accused, at the time he confesses, is in possession of 'mental freedom' to confess to or deny a suspected participation in a crime." (Ashcraft v. State of Tennessee, 321 U. S. —; Hysler v. Florida, 315 U. S. 411, 413.)

The People (in the Brief in O to P for C. p. 21) argue that:

> "Malinski was possessed of 'mental freedom' at the time he made his oral confession. That he was deprived of it, later, when he made his official confession it is impossible, from all of the circumstances to believe."

Again it is emphasized that there is no evidence of an "oral" confession. It has been said that Malinski made a "complete" confession about 5:30 or 6:00 P. M. October 23rd. The assertion is a mere conclusion. No attempt was made to prove the details—to show what he said. Not satisfied with what was said at that time, the police continued their persistent questioning until 2:30 A. M. October 27th when the confession desired was stenographically recorded. It may be impossible for a prosecutor to believe that Malinski had not by then been deprived of his "mental freedom"; it would be difficult to find anyone else so naive as not to be certain that he acted under duress.

Again, the district attorney said (R. 1254):

> "Malinski was held and he was allowed to sleep there.[14] He could not get away. When McNally was asked, 'did you place him under arrest?', he probably meant he did not book him right away. They hold men for several days.[15] Are you satisfied with that? They are not going to let him go home, or let him get hold

[14] Referring to Malinski's detention at the Hotel Bossert.

[15] Such action is in violation of the New York Stature § 165 of the Code of Criminal Procedure, *ante*, p. 10.

> of a smart mouthpiece to preach about his rights and to sue out writs. You want a district attorney in this county that is worth his salt, not a powder puff district attorney. When you are trying a case of murder, especially murder of a police officer, you don't go over and give him a pat on the back and say: 'Do you want anything? Do you want to have your lawyer, or your wife, or somebody else?' In fact after that they would not let him see Mr. Math, an assistant in our office; they would not let him talk to a Rabbi. Do you think that McNally, 17 years in the Police Department, is going to let this jerk from the East Side tell him his business?"

In view of the long and historical struggle to establish and protect fundamental rights which are sacred to Anglo-Saxon civilization can a more shocking and incredible statement be imagined?

Commenting upon the foregoing and other passages in the District Attorney's summation, Judge Conway, in the prevailing opinion (292 N. Y. 360, 373), said:

> "The remarks were indefensible."

A further excerpt is as follows:

> "Just imagine! Down there on that bleak winter's night, Patrolman Fox trying to do his duty in the face of these hoodlums who were out there in Coney Island from the lower east side of Manhattan, *where your life is not worth a pretzel.*" (Rec. p. 1258). (Emphasis ours.)

It is a notorious fact of common knowledge, that in the region of the City of New York, usually referred to as the lower "East Side", there are hundreds of thousands of Jewish people. They are decent, thrifty, industrious, law-abiding and patriotic. Of course some of the residents of that section at times commit crimes and are in conflict with law.

It is not an uncommon thing for attempts to be made to create the impression that all of the inhabitants of the lower East Side are criminals, and because of their *race and religious beliefs* are an undesirable element of the community. The whole tenor of the "indefensible" remarks of the assistant district attorney was a brazen appeal to racial and religious prejudices, highly detrimental to these defendants—both of whom are Hebrews—designed to have the jury convict defendants because of their race rather than on the evidence.

This insidious appeal to racial prejudice was not a spontaneous utterance made in the excitement of an overzealous summation. It was deliberate and carefully planned and shrewdly calculated to implant the poisonous seed in the jury's minds. That such was the fact is clearly indicated by another excerpt from the summation:

> "Killing", he said speaking of Malinski "a patrolman in the dead of winter and coming back and saying 'that donkey went down like a ton of bricks!' I guess he thought he hit a *Sullivan* or *McCarthy*, or *McGough*, or something * * *" (Rec. p. 1276). (Italics supplied.)

Could anything be clearer? Could there be any misunderstanding of what was meant? Could the poison have been more skillfully injected? Could the conduct have been more dastardly?

The Court was in agreement as to the outrageous and inexcusable character of the assistant district attorney's statements.

The majority took the position that although counsel had interrupted the summation a number of times, that they were so little impressed by the offensive character of the remarks, they made no objection to them. Chief Judge Lehman pointed out, however, that exception was taken by motion for a mistrial. Under the practice in New York

State, in a capital case it is not essential for review by the Court of Appeals that an exception be taken. The Court has power to reverse for error, whether any objection be made or exception be taken.[16] But the question was not, as Judge Conway seemed to assume, whether the remarks were such as to impress counsel with their impropriety. The important question is, were they harmful to the defendants? If they were, no exception was needed. It was the duty of the Court to give such relief to the defendants as the situation required; if they were not harmful an exception was futile.

The situation recalls the poignant words of Goldsmith.[17]

"When lovely woman stoops to folly,
And finds too late that men betray;
What charm can cure her melancholy?
What art can wash her guilt away?

Moreover it is difficult to follow the reasoning of the majority of the Court. It certainly does not conform to any recognized system of logic. Indeed it seems to illuminate Herbert Spencer's comment upon the seeming incongruity between Tristian Shandy's father's argumentative powers and ignorance of formal logic.[18] After referring to the remarks of the District Attorney quoted in Chief Judge Lehman's dissenting opinion, and characterizing them as "indefensible" Judge Conway concluded that "*the effect of the utterances, it seems to us, would inure to the benefit of Malinski rather than against him* and they did not relate to Rudish or Indovino." (Emphasis supplied.)

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[16] Section 528 of the New York Code of Criminal Procedure is in part as follows: "• • • When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence, or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the Court below."

[17] She Stoops to Conquer, Chap. 5, Song Stanza I.

[18] Philosophy of Style (1852).

In all sacred and profane literature there is but one pertinent passage from Robert Burns that constitutes a cogent answer to that specious reasoning:

> "Oh! Wad some power the giftie gie us
> Tae see oursel's as ithers see us.
> It would frae many a trouble free us
> An foolish notions.
> What airs in speech and gait wad lea us
> An e'en devotion."

In the Brief in opposition to petition for certiorari an attempt is made to sustain the Court's reasoning. At p. 27 is the following:

> "The only reason we have referred to Counsel's quiescent reaction to the summation and failure on the part of Malinski's counsel to voice any objection to the 'indefensible statements', is that it is fair, sound argument on Judge Conway's part when he says it seemed to the majority of the Court that the district attorney's utterances would inure to the benefit of Malinski rather than against him."

The Brief then set forth grounds upon which it asserted it was proper to base the conclusion that the "indefensible" remarks inured to Malinski's benefit.

> "If", it is said, "the district attorney conceded that the police endeavored to induce in Malinski a belief that he was going to be beaten if the district attorney went that far, then, if the scales were evenly balanced, the jury might well have accepted Malinski's version of the circumstances under which the confession was obtained" (p. 27).

It is submitted that if the "scales were evenly balanced" the jury could not have been convinced beyond a reasonable doubt that the confession was voluntary and must therefore have disregarded it. The reason assigned, how-

ever, far from supporting the reasoning by which the conclusion that the "indefensible" remarks were beneficial rather than harmful, is but another admission that the police had by inexcusable methods coerced Malinski to confess.

Duty of Trial Court

Moreover, the Trial Court was not without responsibility in the premises. It was under an obligation to act. The trial judge is not supposed to act the Sphinx. His duty is not passive—it is affirmative. He is there not only to preside, but to see that the trial is conducted fairly and impartially and in accordance with the fundamental concepts of fairness and justice. This Court, in *Viereck* against *United States*, 87 Law Ed. 529, commenting upon certain remarks of the prosecuting attorney said:

> "In his closing remarks to the jury, he—the prosecuting attorney—indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice. The trial judge overruled, as coming too late, petitioner's objection first made in the course of the Court's charge to the jury. * * * We think the trial judge should have stopped counsel's discourse, without waiting for an objection."

In *N. Y. C. R. Co.* v. *Johnson*, 279 U. S. 310, 316, 318, the following appears:

> "The public interest requires that the Court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion and prejudice."

In *People* v. *Wolf*, 183 N. Y. 464, 472:

> "An unfair trial, especially in a criminal case, is a reproach to the administration of justice, and casts grave responsibility not only upon the prosecuting offi-

> cers but also upon the trial judge. * * * we have repeatedly laid down the rule governing prosecuting officers in addressing the jury and to govern trial judges also in their duty relating to the subject. We have repeatedly admonished both, the former at times with severity and the latter more mildly, not to depart from that rule, but our admonitions have not always been regarded, although they were followed by reversal of the judgment involved, founded solely on the remarks of the prosecuting officer and the failure of the trial judge to do his duty in reference thereto."

Cf.

People v. *Esposito*, 220 N. Y., 370;
People v. *Manganaro*, 218 N. Y., 9, 17;
People v. *Mull*, 167 N. Y., 247;
People v. *Fielding*, 158 N. Y., 542.

In *People* v. *Conrow*, 200 N. Y., 356, 369, considerable adverse testimony had been elicited in the cross-examination of the defendant and subsequently stricken out by the Trial Court. The Court of Appeals said:

> "It is not always an easy thing for a juryman to eliminate from his memory the effect of damaging statements made in his presence. * * * In this case, where the defendant's life is involved, we are unwilling to take the responsibility of saying that the statements and charges of Monat erroneously received, although stricken out, did not affect the result."

The Trial Court did not interrupt the District Attorney at any time during his "indefensible" remarks, nor did he at any time or in any manner point out in his charge the objectionable and inexcusable character of them, and advise the jury to disregard them and not to be influenced by them. Whatever prejudicial impression the remarks may have made upon the jury no attempt was made to eradicate the improper impression by the one whose duty it was to prevent such results.

This Court has emphatically and in no unmistaken terms condemned such conduct by the prosecuting attorney.

In *Berger* v. *U. S.*, 295 U. S. 78, 88, Mr. Justice Sutherland, speaking for the Court, said:

> "The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interests, therefore, in a criminal prosecution, is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that the guilty shall not escape or innocent suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

This language was quoted with approval in *Viereck* v. *U. S. supra.*

Again, let us quote from the remarks of the district attorney:

> "Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner; let him *think he is going to get a shellacking.*" (Italics ours.) (Rec., p. 1283.)

As said in *People* v. *Pantano*, 239 N. Y. 416, 419:

> "A threat may be implied as well as expressed and the fear engendered is alike in each case."

The assistant district attorney frankly boasted that the procedure adopted was intended to instill a belief that

physical force was to be applied to Malinski. Under the circumstances, the mental condition resulting was the same as if the force were actually used. While there is contradictory testimony as to whether physical force was actually applied, there is no dispute that the procedure followed, as intended to have the same effect.

The People in their Brief, heretofore mentioned, (p. 27) quote from *United States* v. *Mitchell*, 322 U. S. 65, to support their contention that Malinski's confession was voluntary. The very excerpt quoted, however, supports the petitioner's contentions. The Court pointed out that Mitchell had consented to a search of his home and made a prompt acknowledgment of his guilt. He was then detained eight days before being arraigned before a magistrate. "Undoubtedly his detention during this period was illegal." But the acknowledgment of guilt was not made as a result of the detention, nor at the conclusion of it. He made his admissions before there was any illegal detention. "But in any event," said the Court, "the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, as we have seen, were not elicited through illegality. Their admission, therefore, would not be used by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a primitive measure against unrelated wrongdoing by the police."

That is not the case at bar. The very reverse happened here. The detention was continuous and lasted until the confession was obtained; the detention was illegal; the confession was coerced; the People and used the fruit of the wrong-doing by the police. Using the confession so obtained violated the petitioners' Constitutional rights.

The Defendants Having Seasonably Asserted That Their Constitutional Rights Have Been Denied Resulting in a Judgment of Death, This Court Is Required to Make An Independent Examination to Ascertain Whether the Convictions Have Resulted From the Use of Confessions Improperly Obtained.

The petitioners have seasonably asserted their rights. The amended remittitur of the New York Court of Appeals sets forth that defendants' claim that they were denied due process of law under the Fourteenth Amendment was raised and necessarily passed upon by that *Court* (ante, p. 3).[19] The Record on appeal to the Court of Appeals discloses that the questions were raised on the trial in the Court below.

This being a capital case this Court is not bound by the finding of the Court, or the jury, or of both. It is under the solemn duty to make an independent investigation to determine the facts for itself.

In *Chambers* v. *Florida*, 309 U. S. 227, 228, it is said:

> "* * * use by a state court of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means prescribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained by review of the facts upon which that issue necessarily turns."

In *Lisenba* v. *California*, 314 U. S. 219, 240, it is said:

> "* * * we think it right to add that when a prisoner held incommunicado is subjected to questioning by

[19] 292 N. Y. 686.

> officers for long periods and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by use of his confession, he is deprived of his liberty or life through tyrannical or oppressive means."

In *Pierre* v. *Louisiana*, 306 U. S. 354, 358:

> "• • • when a claim is properly asserted • • • that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under the law rests."

In *Ward* v. *Texas*, 316 U. S. 547, 550, the Court said:

> "Each State has the right to prescribe the tests governing the admissibility of a confession. In various States there may be various tests. But when as in this case, the question is properly raised as to whether a defendant has been denied the due process of law guaranteed by the Federal Constitution, we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission amounts to a denial of due process."

In *Ashcraft* v. *Tenn.*, 88 L. ed., Adv. Op., No. 14, 858, speaking of the duty of the Supreme Court to make an independent examination to determine whether a confession was voluntary, the Court said:

> "Our duty to make that examination could not have been foreclosed by the finding of a court, or the verdict of a jury or both."

Considering the circumstances under which Malinski's confession was obtained, as hereinbefore set forth, the law-

guage of this Court in *White* v. *Texas*, 310 U. S. 530, 533, is peculiarly pertinent:

> "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."

In *Betts* v. *Brady*, 316 U. S. 455, 462, it is said:

> "Due process of law is secured against invasion by the Federal Government by the Fifth Amendment and is safeguarded against state action in identical words in the Fourteenth Amendment. The phrase formulates a concept less rigid and more fluid than those envisaged in the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of the facts in a given case."

In the instant case every device condemned by this Court as obnoxious to the Constitution were all employed to obtain Malinski's confession. Summarized they are: arrest without warrant; an assault with firearms; threats to keep silent; a spiriting away to a hotel, instead of a jail, during which numerous police stations, police headquarters, the County Court House and district attorney's office were passed; stripped naked, upon a flimsy pretext that it was desired to ascertain if there were bullet wounds or scars twenty months after the affray; held incommunicado from 7:15 A. M. October 23rd until 2:10 A. M. October 27th; repeatedly questioned day and night; denied medical attention when requested; denied opportunity to consult a Rabbi or an assistant district attorney, with the conceded purpose of preventing advice or assistance from friends and counsel—the only thing disputed being physical violence—mental coercion being conceded. What more could be done,

or must be done, to establish that a confession is involuntary?

To use Mr. Justice Holmes illuminating expression the petitioner was subjected to a pressure that can only be properly characterized as "hydraulic."

Northern Securities v. *United States*, 193 U. S., 197, 401.

As to Failure to Arraign Without Unnecessary Delay

In a note, page 9, *ante.*, Section 165, of the New York Code of Criminal Procedure, requiring a defendant to be taken before a Magistrate without unnecessary delay is set forth.

Somewhat similar statutes govern federal procedure.[20]

Arraignment of the defendant herein without "unnecessary delay" was a question of law to be determined by the Court. A jury may not speculate upon the motives of the police in failing to arraign promptly. There may be situations where there is unavoidable delay, i. e., inability to locate a magistrate or illness of the prisoner. It is a matter of common knowledge, however, that in the City of New York, magistrates are always available. They sit every day. Night courts are held by them. No issue was presented that magistrates were not available during the period of detention. The purpose of delaying arraignment in order to secure a satisfatcory confession was conceded. It was the duty of the Trial Court to advise the jury as a

[20] "It shall be the duty of the marshal, his deputy, or other officers, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner, or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail" (18 U. S. C. A., Sec. 595).

The Act of June 18, 1934, c. 595, 48 Stat. 1088; 5 U. S. C. A., sec. 300 A, authorizing officers of Federal Bureau of Investigations to make arrests, requires that, "the person arrested shall be immediately taken before a committing officer".

matter of law that the failure to arraign Malinski from the time of his arrest on October 23rd, until October 27th, was a flagrant violation of law. The Court did not do so.

The charge on that question is as follows (R. 1377):

> "* * * I charge you that it was the duty of the police to arraign the defendant before the nearest magistrate without unnecessary delay, and, further, that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor.
>
> But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made, was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession, if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27, at the Bath Beach Station house.
>
> However, I am charging you that the failure to arraign, in and of itself, is not conclusive against the People, and does not, in and of itself, standing alone, destroy the validity of the confession. Is that clear?"

It is respectfully submitted that the charge was erroneous and grossly inadequate. It was not for the jury to speculate as to whether there had been "unnecessary delay," in the arraignment. The fact was so overwhelmingly established, that the jury should have been so advised. They should have been further instructed that such a flagrant violation of law on the part of the police must be seriously and carefully weighed in determining whether the confession of October 27th was voluntary. It should have been pointed out that only after repeated questioning, day and night, for four days, did the police obtain such a confession as they were willing to have transcribed. The jury

should have been told to consider well whether the delay in arraignment was to obtain the sort of confession desired and necessary to involve Malinski. As Chief Judge Lehman pointed out (*ante*, p. 16) that "the conclusion is inescapable that the police delayed the arraignment for the purpose of subjecting the defendant to inquisition thereafter impossible." Moreover, the charge minimizes the importance of a prompt araignment of a prisoner and must have been exceedingly misleading to the jury. As Chief Judge Lehman said (292 N. Y. 360, 387):

> "There can be no fair trial of the issue whether the confession is voluntary, where the jury is not properly informed that the detention was unlawful and they must take that fact into consideration. *That has not been done in this case.*
>
> It is true that in the charge of the Court, the jury was informed that 'it was the duty of the police to arraign the defendant before the nearest magistrate, without unnecessary delay, and further if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor', and 'that if you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27, at the Bath Beach Station House.' That instruction is not sufficient where, as in this case, the evidence produced by the People, conclusively shows that the police flagrantly disobeyed the express mandate of the law. Even if there had been a question in this case, that the delay in arraignment was not 'unnecessary' within the meaning of Section 165 of the Code of Criminal Procedure, that question was not properly submitted to the jury." (Italics supplied.)

No clearer analysis of the circumstances under which the issue of whether the voluntary nature of the confession was adequately and properly submitted to the jury is possible.

The jury was never properly instructed on the applicable law. It was impossible to have an intelligent discussion and decision under the circumstances.

The entire tenor of the charge was apologetic. It sought to minimize the gross dereliction of duty on the part of the police. The soft peddling could not be but misleading to the jury. How could the jury fail to be impressed by the statement, "But, gentlemen, you will bear in mind that the police department is not on trial in this case?" Maybe not; but surely the conduct of members of the police department was a vital issue to be determined. That should have been made clear to the jury; they should not have been left to grope in a maze of uncertainty; they should not have been left to speculate as to whether there had been illegal delay; "illegality is illegality",[21] and good motives and pious intentions and excessive zeal do not make what is "illegal", legal.

Controlling Decisions

This case comes squarely within *Ashcraft* v. *Tenn., supra.* There is a striking similarity between them. It would serve no useful purpose to detail at length the facts established in the *Ashcraft* case. Suffice to say that there appeared to have been continuous questioning by experienced lawyers and police officials; that he was held *incommunicado* for thirty-six hours without sleep or rest. "The Constitution of the United States stands as a bar", said the Court, "against the conviction of any individual in an American Court by means of coercion".

The conceded and proven facts in the instant case hereinbefore specifically set forth, discloses a situation more flagrant and indefensible than that shown in the *Ashcraft* case. No novel rule is asserted by the petitioners. Their

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[21] *United States* v. *Mitchell*, 322 U. S. 65.

rights under the Constitution have been unlawfully invaded. They invoke its protecting aegis, that their lives may not be forfeit by such unconscionable and vicious practices as were indulged in herein.

In the instant case, as in the *Ashcraft* case, neither in the lower Court, nor in the Court of Appeals, was it actually "held as a matter of fact that petitioners' confessions were 'freely and voluntarily made.' "

> "The record discloses that neither the trial court nor the Tennessee Supreme Court actually held as a matter of fact that petitioners' confessions were 'freely and voluntarily made.' The trial court heard evidence on the issue out of the jury's hearing, but did not itself determine from that evidence that the confessions were voluntary. Instead it over-ruled Ashcraft's objection to the use of his alleged confession with the statement that, 'This Court is not able to hold, as a matter of law, that reasonable minds might not differ on the question of whether or not that alleged confession was voluntarily obtained.' And it likewise over-ruled Ware's objection to use of his alleged confession, stating that 'the reasonable minds of twelve men might • • • differ as to • • • whether Ware's confession was voluntary, and • • • therefore, that is a question of fact for the jury to pass on.'[22] Nor did the State Supreme Court review the evidence pertaining to the

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[22] The legal test applied by the trial court to determine the admissibility of the two confessions was stated thus:

"The Court has come to the conclusion • • • that the law in Tennessee with reference to confession is simply this; it is largely a question of fact as to whether or not a confession is voluntary, and is made without hope of reward or fear of punishment. It only becomes a question of law for the Court to decide when, from the facts surrounding the taking of the alleged confessions or statements, the Court, as a matter of law, can hold that the State has failed to carry its burden, which it has of showing that the confessions were free and voluntarily, and that reasonable minds could not differ, and could come to but one conclusion that the confessions were involuntary and forced."

confessions and affirmatively hold them voluntary. In sustaining the petitioners' convictions, on Justice dissenting, it went no further than to point out that, 'The trial judge • • • held • • • he could not say that the confessions were not voluntarily made and, therefore, permitted them to go to the jury', and to declare that it, likewise, was 'unable to say that the confessions were not freely and voluntarily made'.[23]

If, therefore, the question of the voluntariness of the two confessions was actually decided at all it was by the jury."

Proceeding to review further what happened in the State this Court said:

"This treatment of the confessions by the two State Courts, the manner of the confessions' submission to the jury, and the emphasis upon the great weight to be given confessions make all the more important the kind of 'independent examination' of petitioners' claim which, in any event, we are bound to make. *Lisenba* v. *California*, 314 U. S. 219, 237-238. Our duty to make that examination could not have been 'foreclosed by the finding of a court or the verdict of a jury or both.'"

An examination of the circumstances under which Malinski's confession was obtained permits no conclusion other than it was involuntary. The facts have heretofore been reviewed. It is unnecessary to repeat them here. As Mr. Justice Murphy said in *Lyons* v. *Oklahoma*, *supra*, such "flagrant abuse by a State of the rights of an American

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[23] Notwithstanding the apparent fact that neither the trial court nor the appellate court affirmatively held the confessions voluntary, the Tennessee Supreme Court, in its opinion, restated the rule it had announced in previous cases, that, "When confessions are offered as evidence, their competency becomes a preliminary question, to be determined by the Court • • • (If) the judge allow the jury to determine the preliminary fact, it is error, for which the judgment will be reversed." (See Self v. State, 65 Tenn. 244, 253).

citizen accused of murder ought not to be approved." If the scales of justice are to be held even, it cannot be upheld.

McNabb v. *United States* 87 Law. Ed. 579 strikingly resembles the instant case.

The defendants therein were arrested by officers of the Bureau of Internal Revenue, on suspicion of having murdered on officer of that agency, but were not taken before a committing magistrate, as required by Federal statute, 28 Stat. 416 (1894); 18 U. S. C., sec. 595 (1940). After being kept *incommunicado* for several days, and questioned intermittently, they confessed to the murder. The District Court ruled at the trial, that the confessions were voluntary and admissible, and a conviction of second degree murder resulted largely because of the confessions. The Circuit Court of Appeals affirmed; the Supreme Court granted *certiorari* and reversed the convictions on the ground that confessions elicited from he accused while in illegal custody, under the circumstances disclosed, were inadmissible, whether voluntary or otherwise.

There are some remarkable coincidences in the facts in that case and the *instant* one. The defendants were questioned by a number of officers; no friends or counsel were present; one was stripped to ascertain if he had been injured going through the woods at the scene of the affair and greatly frightened as a result (p. 582).

It was pointed out (p. 583) that a conviction in the Federal Courts, cannot stand if it be based on evidence illegally obtained (see authorities cited). That the Court had, on constitutional grounds, set aside convictions, both in the Federal State Courts, which were based upon evidence "secured by protracted and repeated questioning of ignorant and untutored persons in whose minds the powers of

officers were magnified" (authorities cited, p. 584). At page 585, the Court said:

> "Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatments of the petitioners, the arresting officers assumed functions which Congress has explicitly denied them. *They subjected the accused to the pressure of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the government, and which tends to undermine the integrity of criminal proceedings*" (emphasis supplied, p. 585).

Reference is then made to the Federal statutes similar to Section 165 of the Code of Criminal Procedure and continues:

> "The purpose of this impressively persuasive requirement of criminal procedure is plain. A democratic society in which respect for the dignity of all men is central naturally guards against the misuses of the law enforcement process. Zeal in tracking down crim- is not, in itself, an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the danger of the overzealous as well as the despotic * * *. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons constitutes and important safeguard—not only in assuring protection for the innocent, *but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society.* For this procedural requirement checks resort to reprehensible practices known as the 'third degree', which though universally rejected as indefensible, still find their way into use" (emphasis supplied, p. 586).

After summarizing the arrest and the detention and quizzing of the defendants, the Court continues:

> "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded, cannot be allowed to stand without making the *Courts themselves accomplices in wilful disobedience of law.*"

Vide, also:

> *Anderson* v. *United States*, Law. Ed. Adv. Opinions, Vol. 87, No. 10, page 589.

Surely this Court cannot permit itself to be put in the category of an accomplice of those guilty of the atrocious violation of law which the record herein discloses.

In *United States* v. *Mitchell*, 88 L. ed., Adv. Op., No. 13, 812,815 (decided April 24, 1944), Mr. Justice Reed said:

> "As I understand McNabb v. United States, 318 U. S. 332, as explained by the Court's opinion today, the McNabb rule is that where there has been illegal detention of a prisoner, joined with other circumstances which are deemed by this Court to be contrary to proper conduct of Federal prosecutions, the confession will not be admitted. * * * In my view, detention without commitment is only one factor for consideration in reaching a conclusion as to whether or not a confession is voluntary. The juristic theory under which a confession should be admitted or barred is bottomed on the testimonial trustworthiness of the confession. If the confession is freely made, without inducement or menace, it is admissible. If otherwise made, it is not, for if brought about by false promises or real threat, it has no weight as proper proof of guilt."

While it is recognized that the rule in the *McNabb* case, *supra*, thus interpreted applies only to cases in the Federal Courts, and the power to review cases in State Courts, is more restricted and limited (*McNabb* v. *United States*,

supra), yet the petitioners herein contend that there is here both conceded illegal detention and coercion and duress of the most flagrant character.

Other decisions that support petitioners' contentions are:

Ward v. *Texas*, 316 U. S., 547;
Lisenba v. *California*, 314 U. S., 219;
Chambers v. *Florida*, 309 U. S., 227;
White v. *Texas*, 310 U. S., 530;
Vernon v. *Alabama*, 313 U. S., 547;
Lomax v. *Texas*, 313 U. S., 544;
Canty v. *Alabama*, 309 U. S., 629;
Brown v. *Mississippi*, 297 U. S., 278;
Pierre v. *Louisiana*, 306 U. S., 354;
Betts v. *Brady*, 316 U. S., 455;
Lyons v. *Oklahoma*, 88 L. Ed., Adv. Op., No. 16 1076.

The facts herein come within the principles enumerated therein. In none are the facts so conclusive as herein. Even in those of the above cited authorities where the decision has been adverse to the petitioners, the applied rule compels a required favorable conclusion herein.

Nothing is to be gained by a detailed recital of the circumstances of the foregoing decisions. Unusual circumstances, not present in the instant case, have compelled conclusions that would be illogical and inconsistent upon the established facts in the case under review.

But when there is shown to have existed such facts as were established herein but one conclusion is logical and just.

As said in the Report of the Committee on Lawless enforcement of Law, Amer. Journal of Police Science, p. 587; "Holding incommunicado is objectionable because arbitrary—at the mere will and unregulated pleasure of a police chief"—we have it here; "the use of the third degree is

obnoxious because it is secret; because the prisoner is wholly unrepresented"—we have it here; "because there is present no neutral, impartial authority to determine questions between the police and the prisoner"—we have it here; "because there is no limit to the range of the inquisition, nor to the pressure that may be put upon the prisoner"—we have that situation here. And when it is considered how little information was furnished either by the police or the district attorney as to what transpired outside of continued questioning of Malinski during his detention incommunicado from 7:30 A. M. October 23rd until 2:00 A. M. October 27, it needs no extraordinary degree of intelligence, merely ordinary experience, to picture what Malinski must have undergone during his incarceration.

Conclusion

The fact of the killing of the deceased by the defendants in a capital case in the State of New York, must be proved beyond a reasonable doubt.[24]

Three of the seven judges of the Court of Appeals voted to reverse the conviction of both petitioners. The reasons for their position were set forth cogently and in detail in Chief Judge Lehman's opinion. It emphasized that there was failure to protect petitioners' right to a fair trial.

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial."[25]

Three judges of the Court of Appeals so concluded. The proven facts more than justify their conclusion. At no time

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[24] N. Y. Penal Law, Section 1041—Appendix, *post*, p. 48.
[25] Lisenba v. California, 314 U. S. 219, 236.

in our history has it been more important for the Courts to stand fast in safeguarding our liberties. The fundamental rights, which the founders, so carefully outlined and protected should not be evaded by a desire to accomplish something worthwhile. The punishment of the murderers of Leon Fox is a praiseworthy task. If the efforts be successful, it should not be at the expense, or in violation, of precious rights. With present world-wide chaotic conditions, the inclination to take short cuts to do so-called justice is ever pressing. The existing War undoubtedly has among its important objectives the preservation of our Anglo-Saxon civilization, with the recognition of man's natural rights to life, liberty and the pursuit of happiness, and the preservation of those institutions so Providentially devised to preserve them.

Let us repeat here and emphasize what was said previously:

> "Important it is indeed to punish crime; but far more imperative is it that our criminal procedure be not polluted with foreign methods, alien to our concept of justice and inconsistent with our system of government."

A calm and dispassionate examination of the record herein and of the circumstances under which Malinski's confession was procured, discloses a process abhorrent to those fundamental concepts of fairness and justice characteristic of our criminal procedure, and repellant to every element of impartiality.

As said by Ch. Judge Lehman in *People* v. *Roper*.[26]

> "'We may not 'sustain a conviction erroneously secured on one theory on the conjecture that it would have followed just the same if the correct theory had been applied'. (Hiscock, Ch. J. in People v. Smith, 232

[26] 259 N. Y. 170, 176.

N. Y. 239, 244). A criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law."

The Court cannot ignore current world wide events. Or as has been so aptly said:

> "Courts cannot emulate the ostrich, and by hiding their heads pretend ignorance of current events of universal knowledge."

This nation is engaged in a titanic world-wide struggle. Its chief object is to destroy arbitrary and totalitarian governments, which arbitrarily deny ordinary natural rights, and to make the blessing of democracy secure for all the peoples of the world. Of what avail to sacrifice the flower of the youth of our country, to pour out unmeasurable treasure, to create burdens to be borne by many future generations to secure those objectives, if some of the more detestable phases of Nazism and Fascism are to be tolerated, even encouraged and approved in our own blessed land? Perish the thought! This sanctuary of freedom, liberty and democracy must be preserved inviolate. The one hope is this tribunal. Failure here, means disaster everywhere else.

To sustain the judgment of the Court of Appeals will be to deprive the petitioners of their lives without due process of law.

Respectfully Submitted,

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JOSEPH A. SOLOVEI,
with them on the Brief.

APPENDIX A

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

APPENDIX B

Judicial Code of the United States, Section 237 (b), as Amended, 28 U. S. C. A., Section 344 (b).

It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right

is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

APPENDIX C

Section 165 of the Code of Criminal Procedure of the State of New York

The defendant must in all cases be taken before the magistrate without unnecessary delay.

APPENDIX D

Section 399 of the Code of Criminal Procedure of the State of New York

A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

APPENDIX E

Section 1844 of the Penal Law of the State of New York

A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such a person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

APPENDIX F

Section 528 of the Code of Criminal Procedure of the State of New York

When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence, or against the law, or that justice requires a new trial, whether any exception shall have been taken or not in the Court below.

APPENDIX G

Section 595, United States Code of Criminal Procedure, Title 18, United States Code (1940 Ed., Vol. 2)

It shall be the duty of the Marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under the existing laws for a hearing, commitment, or taking bail for trial, • • •

APPENDIX H

Section 300 A of Title 5, United States Code (1940 Ed., Vol. 1, p. 124)

The Director, Assistant Directors, agents, and inspectors of the Division of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that

the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Division of Investigation of the Department of Justice are authorized and empowered to carry firearms.

APPENDIX I

Section 1041 New York Penal Law

No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 367

MORRIS MALINSKI and SIDNEY RUDISH,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS CRADOCK HUGHES,
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Kings County,
New York.

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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 367

MORRIS MALINSKI and SIDNEY RUDISH,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

Statement.

The petitioners seek a review of the judgments of the County Court of Kings County, convicting them of the crime of Murder in the First Degree. On appeal to the Court of Appeals, the highest court of the state, the judgments of conviction were affirmed by a divided court. Extended majority and dissenting opinions were written and are reported in 292 N. Y. 360. Thereafter, petitioners made a motion for reargument which was denied on June 14, 1944, without opinion.

On May 16, 1944, a hearing was had before Honorable Thomas E. Dewey, Governor of the State of New York, to determine whether any reasons existed for extending clemency. Before decision was made, petitioners, on June 17, 1944, applied to Mr. Justice Jackson for a stay of execution pending their application for a writ of certiorari. The stay was granted on June 19, 1944. Meanwhile, sentenced under the affirming order of the Court of Appeals to be executed during the week beginning May 29, 1944, the petitioners, on May 31, received temporary respites to the week of June 19, 1944. Following the granting of the stay, the petitioners received further reprieves pending this court's decision on the present application.

Questions Presented.

Malinski contends that the admission in evidence of "certain confessions of the petitioner" was a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States (Petition, p. 4) and that, "in addition to the oppressive conduct of the police and prosecuting officers there were other violations of petitioners' rights so highly prejudicial as to deprive them of a fair trial under the Fourteenth Amendment". Cited as an instance is the final address of the assistant district attorney. Malinski contends that therein "remarks were indulged in of so highly a prejudicial and vicious character as to vitiate the trial" (Petition, p. 11).

Rudish, notwithstanding no confession was received from him, contends that the reception in evidence of Malinski's confession, which was admitted only as against Malinski, "must have had tremendous influence with the jury in determining Rudish's guilt"; and, "If it were wrongfully admitted the conviction of Rudish should not be permitted to stand" (Petition, p. 12).

Record Facts Material to the Questions Presented.

General Outline of the Case.

The deceased, Leon Fox, was a patrolman of the Police Department of the City of New York, attached to the Coney Island precinct, in the Borough of Brooklyn. He was thirty-four years of age and had been a policeman for thirteen years. On the night of February 15, 1941, he set out in the company of Herman Dolinsky, the manager of a Coney Island theatre, the latter bearing a bag containing the theatre's day's receipts amounting to $700, for a bank depository in the general vicinity. As the two men neared their destination, they encountered an automobile standing still in the street, with one door open and its lights out. As Dolinsky narrated what subsequently happened, as he and the deceased passed the automobile a man leaped out, brushed Dolinsky aside and hurled himself on the deceased. Then Dolinsky heard three shots. Dolinsky started to run. He was ordered (R. 129):

"Drop the bag or I will drop you."

Dolinsky did as he was commanded. As he threw the bag away, it was seized by one of the marauders, who then fled back into the automobile and sped away. The deceased was the victim of two bullet wounds. The shots had been discharged at a distance of from six to eight inches.

Four men were involved in the murder, Morris Malinski, Sidney Rudish, Joseph Indovino and Abraham Beitler. Beitler committed suicide at some time after the homicide (R. 716). The trial proceeded against Malinski, Rudish and Indovino. All three were found guilty as charged, but as to Indovino the jury accompanied its verdict with a recommendation that he be imprisoned for life. This the jury was permitted to do under section 1045-a of the Penal Law.

The trial court, acting on the jury's recommendation, sentenced Indovino to life imprisonment. He has appealed to the Appellate Division of the Supreme Court, Second Judicial Department. [1]

Although the crime was committed in February, 1941, the petitioners and Indovino were not arrested until October, 1942, Malinski on October 23 (R. 547), and Rudish and Indovino on October 24 (R. 672). Taken into custody in the morning, Malinski was conducted to a hotel, in Brooklyn, where, at 5:30 o'clock in the afternoon, he confessed to the police (R. 589). The confession was not reduced to writing, but on October 27, at approximately two o'clock, A. M. (R. 621), Malinski made a detailed confession to an assistant district attorney which was recorded by a stenographer and received in evidence on the trial (R. 621-640). The petitioner Rudish made no confession, but incriminating admissions were forthcoming from him to one of the people's witnesses, Nathan Spielfogel. Spielfogel, serving a term of imprisonment in a state prison of from thirty to sixty years for the crime of Robbery in the First Degree, had been invited to participate in the preparations for the homicide, but had declined to do so. Nevertheless, the trial court submitted the question whether or not he was an accomplice in the crime to the jury (R. 1357). The jury's verdict imports that he was not (*People* v. *Clougher*, 246 N. Y. 106, 110). Therefore, Malinski's admissions to Spielfogel which involved him in the plans and preparations for the crime, as well as his actual participation in it, having been believed by the jury, are tantamount to a confession of guilt. We will refer to them, briefly, later.

To revert, for the moment, to Malinski and his confession which he repudiated on the trial as having been wrung from him unlawfully, under the pressure of police brutality and intimidation: his confession, first to the police and then to the district attorney was, in fact, not his first admission of guilt. The homicide was committed

1. The only direct appeal to the Court of Appeals is in a case where the penalty is death (Code of Criminal Procedure, § 517).

at approximately eleven o'clock at night (R. 371). At between one and two-thirty o'clock on the following morning, Malinski appeared at the house of his sister, Shirley Di Pisa (R. 523), in East Tenth Street, Manhattan (R. 523), where she lived with her husband, Pietro Di Pisa, and where, temporarily, a young woman in whom Malinski was interested, Virginia Goonan, also lived (R. 524). As Di Pisa laid in bed, asleep, he was aroused by Malinski's presence in the kitchen, as Mrs. Di Pisa opened the door (R. 526), Malinski was seeking shelter for the night (R. 489). He announced, in Di Pisa's and the Goonan girl's hearing, that he had shot a "cop" in Coney Island, and continued (R. 526):

> "And I got $200 in my pocket."

Malinski's brother-in-law summarily ejected him (R. 527). The Goonan girl testified that she had been lying on a couch, asleep, in another room when she was awakened by a banging on the door. Mrs. Di Pisa opened the door. Malinski asked his sister if he could remain for the night. His sister said there was no room. Malinski announced (R. 489-490):

> "We just shot a cop. We each got $200 apiece."

As Malinski's brother-in-law pushed him out in the hall, the Goonan girl arose from her couch and inquired of the departing visitor (R. 490):

> "What did you do; shoot a cop?"

Malinski's reply to the inquiry directed to him was (R. 490):

> "Get back in bed before I give you the same thing I gave the cop."

Despite the foregoing testimony the petitioners assert (Petition, p. 9): "nor was any effort made to prove any admission by him which would constitute a confession."

We turn now, again, to the case against Rudish, as it was supplied by Spielfogel. Another convict, David Yellin,[2] serving a term of imprisonment of from ten to twenty years for the crime of Robbery in the First Degree, while armed, was the intermediary through whom the conspirators sought to induce Spielfogel to join them in their plot. Describing its object with some detail, Indovino, the third of the convicted men, a few days before the homicide, asked Yellin to communicate to Spielfogel the conspirators' desire that he join them. Beitler, the fourth of the group, said to Yellin (R. 228):

> "When you see Slip[3] tonight, tell him I want him to go on the thing with me, and tell him what it is all about."

Indovino explained that he could not take part in the holdup because he was too well known in Coney Island (R. 230).

Yellin did as he was bade. Spielfogel emphatically declined to have anything to do with the plot. He distrusted Indovino. He explained to Yellin (R. 238):

> "I would not step with that ginny."

On the day preceding the homicide, Spielfogel met Rudish in a candy store on the lower east side of Manhattan, which was the *rendezvous* of this motley group. Rudish inquired (R. 313):

> "How come you are working? What is the matter with that thing? How come you ain't going in on it?"

Spielfogel replied (R. 313):

> "I don't like it, Jake; that is all."

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2. Differentiating his status from that of Spielfogel, the trial court held Yellin to be an accomplice as a matter of law (R. 1347).

3. "Slip" was Spielfogel.

On Saturday, the day of the homicide, Spielfogel and Rudish met again and, after Spielfogel repeated his reason for not entering on the homicide plot, Rudish disclosed that he, Malinski and Beitler were going "to step out on it tonight", and that he was to meet his two confederates at nine o'clock that night (R. 313). A third meeting occurred between the two men on Sunday afternoon, the day following the homicide. At this time, Rudish said to Spielfogel (R. 315-316):

> "With Moish,[4] one of these days, you are going to wind up in the sewer with him; what a * * * he is. Last night everything was fixed to do it one way and he bailed everything up. All he knows how to do is throw a couple of shots."

It was one of Rudish's tasks to steal an automobile to be used in the commission of the homicide and Spielfogel related Rudish's description to him of the manner in which he obtained one (R. 317):

> "* * * it was getting kind of close to the nine mark he said, and he knew he had to go back, so the first load[5] he seen that looked any way decent he just stepped in and he shot all the way back from Brooklyn to New York, and * * * he picked up Malinski on 8th Street, and then he rode over to Houston Street and picked 'Ebbie' (Beitler) up."

At the same time, Rudish described to Spielfogel in part, at least, what happened at the scene of the crime (R. 319):

> "He told me, he says, after he got away from the hoist, after he dropped the car, he went upon the — he got up on the Stillwell Avenue station. He says it sounded like all the sirens in New York was in Coney Island that night. Between that and the fireworks, the shooting he meant, he said he was going insane waiting for the train to come along."

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4. "Moish" was Malinski.

5. A "load" is an automobile.

Jurisdiction.

The order of the Court of Appeals affirming the judgments of the County Court is dated April 20, 1944. The motions for reargument were denied on June 14, 1944. The petition for the writ of certiorari was filed on August 18, 1944. The jurisdiction of this court is invoked under Sec. 237 (b) of the Judicial Code, as amended; 28 U. S. C. A., section 344 (b).

We hope to demonstrate that jurisdiction is totally lacking; that Malinski's "confessions" were lawfully obtained under state law; that as a matter of procedure the question whether such "confessions"[6] were or were not lawfully obtained was submitted to the jury under legally correct instructions of the trial court, and that, as to Malinski, there was no denial of due process. We hope to demonstrate, further, as to Rudish, that he is an intruder upon the due process amendment; that inasmuch as he made no confession, he is not entitled to its protection; that, procedurally, although the petitioners were jointly tried the jury was admonished that Malinski's confession, the recorded confession, was binding only on him, and finally, that apart from Malinski's confession Rudish's guilt was proved out of his own mouth, he having confided his participation in the crime to a witness who was accepted by the jury as a non-accomplice. We will prove further, as to Rudish, that his complaint that Malinski's confession "must have had tremendous influence with the jury in determining Rudish's guilt" cannot be entertained by this court if for no other reason than that Rudish declined an offer by the trial court at the close of the people's case to sever the indictment and permit him a separate trial. We submit, therefore,

6. We use the word employed by the petitioner Malinski, although in a legal sense only one was forthcoming from him, that recorded by a stenographer and received in evidence on the trial.

that none of this court's decisions dealing with due process is applicable to the present situation and that the petition is wholly devoid of merit.

Argument.

I.

The guaranty of due process of law does not furnish a right to have decisions of state courts reviewed upon the ground of alleged erroneous findings of fact or erroneous determinations of law concerning state matters. In determining whether there is any basis for the claim that petitioners were denied their constitutional rights "we must remember that the Fourteenth Amendment does not limit the powers of the States to try and deal with crimes committed within their borders, and was not intended to bring to the test of a decision of this Court every ruling made in the course of a State trial". (*Avery* v. *Alabama*, 308 U. S. 444, 446-447.) "This Court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the states, except to a very limited extent, and for a precisely defined purpose." (*Sauer* v. *New York*, 206 U. S. 536, 546.)

When federal power is invoked to set aside what the highest court of a state regards as a fair trial "it must be plain that a federal right has been invaded". (*Lisenba* v. *California*, 314 U. S. 219, 239.) Such a right is invaded where a defendant in a capital case is denied representation by counsel (*Powell* v. *Alabama*, 287 U. S. 45), or where by the active conduct or the connivance of the prosecution a conviction is obtained through the use of prejured testimony (*Mooney* v. *Holohan*, 294 U. S. 103) or through the use of a confession wrung from the accused by overpowering his will (*Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227), or where the trial is dominated by mob violence in the courtroom, so that there is an actual interference with the course of justice (*Moore* v. *Dempsey*, 261 U. S. 86). The case at bar is outside the

scope of those decisions. The only one with which, generically, it might be classified is *Brown* v. *Mississippi*, *supra*. There is, however, no analogy between the case at bar and *Brown* v. *Mississippi*, supra. There, no room for doubt existed as to the unlawful methods used to obtain the confessions.

> "The opinion of the state court did not set forth the evidence as to the circumstances in which the confessions were procured. That the evidence established that they were procured by coercion was not questioned."

Here, the petitioner Malinski's claims as to violence were refuted and refuted so completely and thoroughly that there can be no doubt that his charges are utterly baseless.

In the prevailing opinion in the Court of Appeals, Conway, J., wrote, concerning the admissibility of Malinski's confession:

> "It is next urged upon us that the confession should have been excluded *as a matter of law* because when Malinski was brought to the hotel he was stripped to see if there were any evidences of bullet wounds in view of the fact that the deceased officer had fired after the automobile, following the shooting, and because there was some evidence that at least one shot had struck the car. The stripping of Malinski for that purpose was concededly proper but complaint is made because he was left in his underwear for the greater part of the first day of his stay at the hotel. Malinski said that he was subjected to physical violence. The testimony as to the violence was not very strong. He said among other things that he was struck twice by a lieutenant and once by another police officer, 'but not too hard' by the latter. 'Not hard enough to throw me over. I was sitting in one of the armchairs.' His lips were not cut; his nose did not bleed; his mouth bled on the inside. Such was Malinski's testimony. He did not complain to the prison doctor because he 'didn't have no injuries'. There was no testimony as

to violence except by Malinski. Neither Rudish nor Indovino claimed to have been assaulted although in the same hotel with the same officers. Neither of them confessed to the police or District Attorney. Whether the confession therefore was induced by fear produced by threats and violence was for the jury to determine. They weighed his testimony as to the violence and they considered the fact that he was compelled to spend most of one day clothed in his underwear and a blanket and the excuse of the police that that was a way to prevent escape in the hotel. Whether these latter circumstances would produce fear so that a man would confess his crime would depend a great deal upon the type of man involved. We do not think it can be held *as a matter of law* that it brought about such fear that the confession followed. All those questions it seems to us were for the jury which saw Malinski and heard him. They were in a position to judge from his appearance and attitude what effect depriving him of his outer clothing would have upon him." [7]

The Malinski Confession.

The legality of the confession under attack must be considered not by itself but in the light of previous admissions made by Malinski to the witness Spielfogel and other testimony implicating him in the crime. First, however, we will briefly relate what Malinski recounted to the assistant district attorney to whom he confessed. He first identified a photograph of the dead conspirator, Beitler. Recalling the date of February 15, 1941, the date of the crime, Malinski said Beitler spoke to him a few days before and in-

7. *Cf.* the foregoing language with this court's observations in *Lyons* v. *Oklahoma* (88 Supreme Court Law. ed. Advance Opinions, No. 16):

> * * * "the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses, but the legal duty is upon them to make the decision (*Lisenba* v. *California, supra,* p. 238)."

quired whether he, Malinski, could procure a car. When Malinski inquired what it was to be used for Beitler replied (R. 624):

"We've got a pay roll to take."

It was to be "taken" on Saturday night, February 15. Malinski said he could obtain one. When Beitler asked him if he could provide guns Malinski replied—so he informed the official (R. 625):

"I think I can get some."

This admission is highly significant, as we will prove by the testimony of other witnesses.

On the following day, Malinski, as he set forth in his confession, met a confederate and asked him to secure a car for Saturday. The confederate said he would steal one[8] (R. 625). Then, Malinski went on to relate, on the night of the homicide, at about nine o'clock, he met the same confederate in an automobile which the latter said he had stolen (R. 626). Malinski joined his confederate in the car and the two drove to a point where Beitler, carrying a package under his arm, entered the automobile (R. 627). Malinski was seated in the front seat. Beitler, he went on to say, displaced him and Malinski took a seat in the rear, alone (R. 627). Then, he continued, the group set out "straight to Coney Island" (R. 627). There, Malinski and his companions visited a restaurant which he described by its name.[9] At ten o'clock, the trio left the resturant, and re-entering their car, drove to a point "down near the bank" (R. 628), "waiting there for a while until we seen the messenger" (R. 629). He continued (R. 629):

"It looked like a long time to me because we were waiting there."

8. Note the admission of Rudish to Spielfogel that he stole the first "load" he could find.

9. He subsequently identified it to a detective.

Finally, as he related the details, Malinski said Beitler left the automobile, after delivering to Malinski two revolvers, one of .45 calibre and the other of .32 calibre, which he removed from the package he carried into the car, retaining two .38 calibre revolvers himself (R. 630). Then Beitler departed toward the corner. Presently, Beitler returned and moved his hand to Malinski indicating that the latter was to leave the car. Malinski continued to his interrogator (R. 630):

> "As I got out of the car, all of a sudden I seen him come running up and the next thing I heard shots. I turned around and ran back to the corner and I seen the officer falling."

Finally, Malinski said to his interrogator (R. 631):

> "Then the man[10] started to run, so he said, 'Stop or I'll shoot. He ran after him and grabbed the bag."

Corroborating Circumstances.

In discussing the crime with Spielfogel on the morning following the commission of the deed, Malinski boasted (R. 305):

> "The cop went down—the donkey went down like a ton of bricks."

He informed Spielfogel that the weapons used were "pieces" which "Red the Tippler" got out of a locker, uptown.

Simon Eisler was "Red the Tippler". His real sobriquet was "Red Tiplet" (R. 447). At the time of the trial he was a corporal in the army.

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10. The "man" was Dolinsky, the deceased's companion. We ask the court to note the similarity in the testimony of Dolinsky and the language of the confession, as to the admonition.

Eisler testified that in the latter part of December, 1940, he met Malinski, with whom he was acquainted for three years, at the Citadel Club at Fourth Street and Avenue C (R. 449). Malinski delivered to Eisler a ticket, or the stub of a ticket, together with $4, and directed him to recover a package and bring it to the Citadel Club (R. 451). Eisler recovered the package from a railroad terminal in Forty-second Street, and returned with it to the Citadel Club where Malinski opened it, in Eisler's presence, revealing four pistols, two fountain pens and two .38 calibre revolvers, wrapped in stockings (R. 452).

But that is not all.

Peter Shamin, an eighteen year old high school student, in February, 1941, was employed, part time, by a store keeper named Rouch in First Avenue, where Malinski also was employed as a stock clerk, or salesman (R. 472). On the afternoon of February 15, 1941, Malinski said to Shamin (R. 1048):

> "Go get the bag of pieces in the hall—they are between the napkin boxes—and put them in the toilet."

Shamin did as he was told. He recovered a brown paper bag:

> "I went and got the bag" (R. 1048).

The paper was heavy. So was the package (R. 1050):

> "I felt the butt of a gun" (R. 1050).

After Shamin had deposited the bag underneath the sink of the toilet, he "ran out" and Malinski followed "straight in" (R. 1051).

That ended the incident. Malinski left, at seven o'clock, for his evening meal. Shamin left, with the same object in view, at shortly before eight o'clock, and returned at eight-thirty o'clock (R. 1051). Malinski never returned, or, at least, Shamin did not see him again that night (R. 1052).

In *People* v. *Mummiani* (258 N. Y. 394, 397), a case in which Lehman, J., writing for the majority of the court, lashed out—as the same learned jurist has frequently done—at unlawful methods in obtaining confessions, nevertheless, it was pointed out:

> "A narrative so circumstantial cannot easily be reconciled with the defendant's present story that it was an utter fabrication. A multitude of circumstances not sufficient of themselves to establish the defendant's guilt bring the confessions into accord with probability."

In the "multitude of circumstances" therein referred to we find none as, singly, or all taken together, persuasive as those which we have adverted to in connection with Malinski's confession to assistant district attorney Heffernan.

We turn again, however, to the confession that the petitioners have refrained from referring to, and that is the one he made in his sister's home, in her presence, and in the presence of her husband and of a third person, a few hours after the commission of the crime.

What motive could Di Pisa, Malinski's brother-in-law, have had to fabricate evidence involving his wife's brother? None that appears, none that was proved, none that, even by suggestion—except by Malinski's weak and tepid allegation that her husband, the witness against him, had ill-treated Malinski's sister—may be seized upon as the basis of a charge that Di Pisa lied. Di Pisa's wife—Malinski's sister—did not come to his defense to deny that he had appeared at her home at an early hour in the morning following the homicide, confessing his part in it and begging refuge. If Mrs. Di Pisa, as Malinski charged, was the victim of a husband who abused her—and therefore, because Malinski as a "dutiful" brother resented his conduct, Di Pisa was not averse to swearing Malinski's life away—Mrs. Di Pisa was the best witness to the wantonness

of Di Pisa's motive. But Mrs. Di Pisa did not come to Malinski's defense to support any claim:

1. That her husband had a motive to lie her brother's life away.

2. That her brother did not confess his part in the crime in her home, within a few hours after it had been committed.

What, then, becomes of the issue of coercion, of police "brutality"? True, it was an issue in the case. The trial court, under correct, legally approved instructions submitted it to the jury as such (R. 1380-1381):

> "Under the law, therefore, you will determine, first whether or not this confession is voluntary. If you find that it was involuntarily made, or if you have a reasonable doubt about it, then you will disregard the confession entirely. On the other hand, if you find beyond a reasonable doubt that the confession is a voluntary one, you will then determine whether or not the statements inculpating the defendant therein contained are true. If you shall have resolved both of these questions in favor of the prosecution, then and only then, you will consider the confession in determining the guilt of the defendant of the crime of murder in the first degree." [11]

In *People* v. *Doran* (246 N. Y. 409), a leading case on the topic, the court said:

> "Here was an issue of fact. Who was to decide it? The jury. They had all the testimony, and the court

11. "When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment are satisfied, and this court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness" (*Lyons* v. *Oklahoma*, *infra*).

left it to them to say, after a very full and complete charge, whether or not the confession was voluntarily made, and instructed them that if they concluded that it was not voluntary, but had been obtained under the influence of fear produced by threats, they should throw it out of the case entirely, and disregard it. When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

Stripped of all its varnishings, Malinski's recital on the trial of police brutality lacked verisimilitude, wholly. From his own lips the jury was informed that Malinski suffered no external appearance of the ordeal he says he was compelled to go through: his mouth bled on the inside, but his nose did not bleed. His nose hurt him. His lips were swollen "a little", on the bottom (R. 561). But when he was committed to jail, Malinski made no complaint to the physician there. He made plain the reason (R. 563):

"I didn't have no injuries."

And, notwithstanding the ordeal he said he had been through, Malinski did not ask for the services of a physician.

The trial court (with Malinski's assistance) proceeded to demonstrate further the falsity of his defense (R. 569):

"Q. Did you appear before a Magistrate? A. The fourth day after they had me.

Q. That would be what day? A. October 27th, Tuesday morning.

Q. In the Homicide Court? A. Felony Court.

Q. Did you stand up in the presence of the Magistrate? A. Yes.

Q. Right in front of the bar? A. Yes, sir.

Q. Within his view? A. Yes, sir."

And, if further support were needed of the utter worthlessness of Malinski's claims, he supplied it himself to Mr. Hefferman, the assistant district attorney to whom he confessed. At the conclusion of his interrogation, the following occurred (R. 639):

> "Q. Now, you are making this statement voluntarily to me? A. Yes, sir.
>
> Q. Nobody forced you or did anything to you, did they? A. No.
>
> Q. How have the police treated you since you have been with them? A. All right.
>
> Q. Nobody did anything wrong to you? A. No."

Malinski was taken into custody on October 23 (R. 573). Concededly, he was not arraigned before a Magistrate or "booked", until October 27 (R. 586-587). During this time he was in the custody of police officers at the Hotel Bossert, Brooklyn. He was kept there with his consent. According to Detective McNally, Malinski, when he was asked whether he preferred to remain there, instead of being lodged in a police cell, said his preference was the hotel. Also, according to McNally, when at five-thirty o'clock on the afternoon of the day of his arrest, Malinski, admitted his part in the killing, neither Indovino nor Rudish had been apprehended (R. 589). That this is so, is borne out by the testimony of Indovino that he was arrested on October 24 (R. 672), and of Rudish that he was arrested on the same day (R. 672).

During the interval of three days following Malinski's admission of guilt and his confession to assistant district attorney Hefferman, on October 27, the police officers were continuing their investigation of the case (R. 589). That is not an unreasonable explanation of the police officers' delay in arraigning Malinski. Particularly, it is not unreasonable if it was true that Malinski acquiesced in being kept at a hotel instead of being placed in a cell.

> "In the absence of justification the detention for almost thirty six hours was illegal and though the

> illegality does not require the inference that the confession obtained was involuntary, yet it has a substantial bearing upon that disputed question" (*People* v. *Alex*, 265 N. Y. 192).

Justification here appears. Of what avail would the information supplied to them by Malinski have been to the police if prompt arraignment followed disclosures of the afternoon of October 23, and his guilty partners were put on warning and thus allowed to escape? But whether justification appears or not the court advised the jury of the effect of the police officers' delay in arraigning their prisoner. Commenting on McNally's testimony that Malinski was allowed to remain at the Hotel Bossert (with Spielfogel) at his own desire, the court instructed the jury (R. 1377):

> "Be that as it may, I charge you that it was the duty of the police to arraign the defendant before the nearest Magistrate without unnecessary delay and, further, that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor."

The foregoing instruction was followed by the following (R. 1377):

> "But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion either direct or implied, which is prohibited by the statute and which invalidates a confession. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27th at the Bath Beach station house."

We do not perceive what more the court could have done in dealing with Malinski's confession than it did, other

than to reject it entirely and this it had no right to do (*People* v. *Doran*, 246 N. Y. 409). The court fully complied with the admonition in *People* v. *Alex* (265 N. Y. 192):

> "In every case where there is a substantial question of the voluntary nature of a confession obtained while a defendant is in the custody of the police and arraignment is delayed, it is the duty of the trial judge, at least upon request of counsel, to charge that any 'unnecessary delay' in arraignment is forbidden by law and should be considered by them."

In *People* v. *Mummiani*, *supra*, it was pointed out:

> "Whatever the rule may be in other jurisdictions (*Bram* v. *United States*, 168 U. S. 532), our law does not require that a confession to be admissible shall be a spontaneous utterance made by a defendant to relieve his conscience."

Here, as we have seen, Malinski whether it was to relieve his conscience or not, did what Judge Lehman envisaged: within a few hours of the commission of the homicide, he unbosomed himself of a "spontaneous utterance" than which there could be no clearer, or more unequivocal acknowledgement of guilt by one involved in a crime.

So far as alleged police brutality is concerned, the issue is controlled by *Lyons* v. *Oklahoma* (88 Supreme Court Law. Ed. Advance Opinions 16):

> "There was also a third confession, oral, which was admitted in evidence on the trial, without objection by petitioner. This was given to a guard at the penitentiary two days after the second."

And, we quote again:

> "The fact that Lyons, a few days later, frankly admitted the killings to a sergeant of the prison guard, a former acquaintance from his own locality,

> under circumstances free of coercion, suggests strongly that the petitioner had concluded that it was wise to make a clean breast of his guilt, and that his confession to Dunn was voluntary."

The situations are transposed. Lyons first confessed, using the term in its formal sense, and then admitted the crimes, informally, to another official. Here Malinski made an open admission of his guilt at a time when no inducement existed to do so. He talked freely, at about the same time, with Spielfogel, about the happenings of the fatal night in Coney Island. He had no reason to believe then that the confidence he had reposed in his relatives and the Goonan girl and Spielfogel would be violated. The natural instincts of his relatives and of the Goonan girl threw about him the cloak of their protection. Spielfogel and himself were much of the same ilk: thus he had no reason to believe that he ever would suffer betrayal from that source.

We quote again from *Lyons* v. *Oklahoma:*

> "The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess to, or deny, a suspected participation in a crime. *Ashcraft* v. *State of Tennessee*, 321 U. S.—No. 391, October term, 1943, decided May 1, 1944; *Hysler* v. *Florida*, 315 U. S. 411, 413, 86 L ed 932, 934, 62 S. Ct. 688."

Certainly, Malinski was possessed of "mental freedom" at the time he made his oral confession. That he was deprived of it, later, when he made his official confession it is impossible, from all of the circumstances, to believe.

Applicable, also, is *United States* v. *Mitchell* (322 U. S. 65):

> "It is these admissions and that property which supported the convictions, and which were deemed by the court below to have been inadmissible. Obvious-

> ly the circumstances of disclosure by Mitchell are wholly different from those which brought about the disclosures by the McNabbs. Here there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights, but instead the consent to a search of his home, the prompt acknowledgment by an accused of his guilt, and the subsequent rueing apparently of such spontaneous cooperation and concession of guilt."

Dealing with a long delay in arraignment, the court continued:

> "But the circumstances of legality attending the making of these oral statements are nullified, it is suggested, by what followed. For not until eight days after the statements were made was Mitchell arraigned before a committing magistrate. Undoubtedly his detention during this period was illegal. The police explanation of this illegality is that Mitchell was kept in such custody without protest through a desire to aid the police in clearing up thirty housebreakings, the booty from which was found in his home. Illegality is illegality, and officers of the law should deem themselves special guardians of the law. But in any event, the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be used by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police."

The District Attorney's Summation.

In the prevailing opinion of the Court of Appeals, the author thus discusses the subject:

> "It is next urged upon us that the Assistant District Attorney gave his views as to the reason why Malinski was left in his underclothes and we are asked to reverse because of that. The three defendants on trial were represented by experienced counsel. It is true the Assistant District Attorney made the statements quoted in the dissenting opinion. The summation covers sixty-three printed pages. The first quotation is twenty-nine pages before the second. The District Attorney was interrupted by counsel fourteen times. Nearly all of those objections were made by the attorney for Malinski. Yet no interruption by objection was made to the remarks quoted. *That is no excuse for the remarks but it is some indication of the fact that none of the counsel took them seriously.* The remarks were indefensible. Whether under the circumstances a new trial should be ordered for Malinski because of these disconnected and disjointed utterances which at the time of their utterance brought not a single one of the counsel to his feet to make objection, is a matter of judgment. Our judgment is that the verdict should stand and be affirmed. Even apart from the fact that it did not appear important enough to counsel to cause them to register an objection immediately, the effect of the utterances it seems to us would inure to the benefit of Malinski rather than against him and they did not relate to Rudish or Indovino." (Italics ours.)

The record fully supports Judge Conway's observations. It is true that none of counsel took the objectionable remarks seriously, either as they were uttered, or as the summation ended. Thus, at the close of the summation, counsel for Malinski took exception to the reference to Ma-

linski's sister and the failure to call her as a witness and the argument that damaging testimony would have been elicited from her, if she had been called. The court sustained the objection and instructed the jury to disregard the argument (R. 1311). At the same time the court denied a motion for the withdrawal of a juror (R. 1311).

As we turn to counsel's interruptions of the summation we find that some not too serious objections were made to references to the testimony. They amounted simply to a colloquy between court and counsel and the result seems to have been satisfactory.

Then, we find that the district attorney, referring to Shirley Di Pisa, argued (R. 1268):

> "Where is his sister Shirley Di Pisa? Where is that girl? Where is that woman?"

Counsel objected to this argument and was overruled. Again the district attorney's argument was (R. 1290):

> "* * * and I say, if there was any answer to it, and it did not happen, the sister, Mrs. Di Pisa, should be in here."

Again counsel objected to the argument. The objection was overruled (R. 1290). The district attorney continued:

> "And if she is not here, you can draw the inference that her testimony would be damaging to him."

Counsel again objected, but no ruling was made. However, as we have seen, the court, at the conclusion of the summation, reversed itself as to the legal effect of Mrs. Di Pisa's absence.

The district attorney, discussing Kovner's testimony, argued (R. 1293):

> "* * * he saved these three defendants from being killed at the hands of Beitler—why would he save them one year and then come down here from Attica prison, and try to convict them of murder."

Counsel for Malinski objected to the statement and the court upheld him, saying (R. 1293):

> "The jury will disregard the District Attorney's statement unless it is borne out by the fact. The jury's recollection of the evidence will control."

The district attorney later argued with respect to the psychiatrists' examinations of Spielfogel "and the others", and the fact that it is a common practice for criminals to lie to such examiners (R. 1304):

> "Of course they lie about these things. These men told you they are up in the 'bug house'. Indovino says he was up in the 'bug house'."

The objection of counsel for Indovino to the argument was sustained.

It is plain, therefore, that counsel did not hesitate to interrupt the district attorney's summation, but the interruptions were upon immaterial things, while the more important ones—the "indefensible statements" as they have been characterized—were entirely ignored. We repeat, it is true, therefore, that counsel, at least as they were uttered, did not take them seriously.

We turn now to what happened at the close of the summation. Counsel for Malinski asked for the withdrawal of a juror and the declaration of a mistrial "upon all the other exceptions taken during the course of the summation". Then occurred (R. 1311):

> "The Court: What other points do you have so that there will be no mistake?
>
> Mr. Solovei: The ones I made during the summation.
>
> The Court: Repeat them.
>
> Mr. Solovei: I don't know. I made them during the time I got up.
>
> The Court: Repeat them.
>
> Mr. Solovei: I cannot remember now. The record will show.
>
> The Court: The motion is denied."

Thus far where is there any indication, anywhere, that counsel regarded the "indefensible statements" seriously?

One of counsel for Rudish now interposed an objection to the district attorney's argument. The court pointed out that it was mere argument and overruled the objection (R. 1312). Thus far, counsel for Rudish, too, took no occasion to voice their objections to any of the district attorney's "indefensible statements".

One of counsel for Indovino now objected to the summation "in its entirety". The court asked counsel to point out what he had in mind (R. 1313). A long colloquy ensued in which parts of the testimony were discussed. Finally, counsel for Indovino objected to the district attorney's statement that "there is nothing in holding these defendants for sixty hours or more without arraigning them".

The court sustained the objection (R. 1314). Further lengthy colloquy followed. No reference is made therein to the "indefensible statements". It was not until the very end that one of counsel for Rudish objected to the remarks of the district attorney with respect to the detention of Malinski as "highly improper, and illegal". The court inquired:

> "Does Malinsky's counsel make an objection?"

Counsel for Malinski vaguely replied:

> "I made my objection on the record."

We have seen that he did not. Then, plainly as an afterthought, counsel asked for the withdrawal of a juror and the declaration of a mistrial on the basis of the district attorney's remarks (R. 1320).

We believe we have proved that counsel did not take the district attorney's "indefensible statements" seriously.

If counsel were as unperturbed as the record discloses they were about the objectionable remarks of the district attorney when uttered and asked for no ruling upon them,

it is plain that the complaint later made concerning them, and now repeated, is not in all sincerity.

We are aware that this court is not concerned with the district attorney's summation and would have no control over it ordinarily, and that its only significance, as a Federal question, goes to the question of whether or not it is true that Malinski was coerced into the confession he made to Mr. Heffernan and therefore denied process of law. The only reason we have referred to counsel's quiescent reaction to the summation and failure on the part of Malinski's counsel to voice any objection to the "indefensible statements", is that it is fair, sound argument on Judge Conway's part when he says it seemed to the majority of the court that the district attorney's utterances "would inure to the benefit of Malinski rather than against him".

These remarks inured to Malinski's benefit for this reason:

It was for the jury to determine whether or not Malinski's confession was voluntary. Malinski's claim was that it was not. The issue was met by the testimony of the police officers that he was not beaten or coerced. If the district attorney conceded that the police endeavored to induce in Malinski a belief that he was going to be beaten, if the district attorney went that far, then, if the scales were evenly balanced, the jury might well have accepted Malinski's version of the circumstances under which the confession was obtained. It was the jury's right to accept it or reject it. In other words, the jury could have reasoned:

Malinski says he was beaten; the police deny that; the district attorney is candid enough to say that the police let him believe he was going to be beaten for the psychological effect such a mode of dealing with him might have upon him.

The jury might well have reasoned that the district attorney's concession lent verity to Malinski's claim and might have accepted his testimony in its entirety as truthful.

We say it is a fair conclusion that that was the attitude of Malinski's counsel in not interrupting his opponent: that he felt that instead of hurting Malinski the district attorney's argument helped him and he was willing, by remaining silent, to speculate that such an effect would follow.

Finally, in so far as Malinski is concerned, the majority opinion in the case at bar is in consonance with *People* v. *Slover* (232 N. Y. 264):

> "We have assumed in each case on its particular facts that the jury were not affected by such matters, but by affirming the judgment of conviction we have not approved the conduct of the district attorney. We have dealt with it as the result of 'well-intentioned though misguided zeal' which probably was unheeded by the jury and had no inference on their final action, while in the case of a vigorous dispute over a defendant's mental capacity we have not hesitated to order a new trial for such excesses on the part of the prosecutor. (*People* v. *Esposito*, 224 N. Y. 370. See, also, *People* v. *Mull*, 167 N. Y. 247; *People* v. *Wolf*, 183 N. Y. 464, 472.)"

The court, earlier (*People* v. *Conklin*, 175 N. Y. 333) had said:

> "The case must be quite exceptional where a question of law, reviewable in this court, is presented, based upon the address of the prosecuting officer."

We submit that this record does not present such an exceptional case.

The Case of Rudish.

We promised in the beginning to demonstrate that Rudish has no standing on this application. Rudish did not vouchsafe a formal confession. The only confession he made is what may be deemed as such in his admissions to Spielfogel before and after the commission of the homi-

cide. Therefore, there is no question of due process involved as to him, because there is nothing that he said that was coerced from him in any manner. All that he said was said freely and voluntarily. It is sought to invoke the due process amendment in Rudish's favor, however, because, it is said, the "device" by which the court suppressed the names of his confederates in Malinski's confession as it was read to the jury proved "futile". In support of the claim that, therefore, Rudish's rights were prejudiced *Anderson* v. *United States* (318 U. S. 350) is cited. An excerpt of the opinion is set forth. What is not set forth is its context:

> "So also, while the trial judge appeared to admit the confessions 'only to be used against the persons who made them' his charge bound the jury to no such restricted use of the confessions. On the contrary, from what the trial judge told them the jury had every right to assume that in ascertaining the guilt or innocence of each defendant they could consider the whole proof made at the trial. There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others."

That is not the situation here. Before we proceed to discuss what happened here, we beg leave to point out that *Anderson* v. *United States*, *supra*,[12] has no application. No Federal question is involved in Rudish's case.

"Matters of this sort are addressed to the discretion of the trial judge" (*Stroud* v. *United States*, 215 U. S. 15, 20), and where the decision is that of a state court it is

12. Neither has *Viereck* v. *United States* (318 U. S. 236). Both cases involved the application of summary Federal judicial power, and neither dealt with an exclusively procedural state matter.

not subject to review here (*Barrington* v. *Missouri*, 205 U. S. 483; *Thomas* v. *Texas*, 212 U. S. 278, 281-282).

In the case at bar, as the confession was about to be read to the jury, the following occurred, as counsel for Rudish (Mr. Carabba) and Indovino (Mr. Geoghan) asked that the jury be instructed that the confession was binding only on Malinski (R. 618-620):

> "I am going to make certain observations, and I am going to ask the jury to pay strict heed to what I say. You are about to hear an alleged statement read. The Court has together with counsel read that statement, and the Court is forewarned as to what it contains. You will hear read matters concerning a Mr. X and Mr. Y. Those names, Mr. X and Mr. Y, have been substituted by order of the Court for names in the confession. Those names have been deleted by order of the Court from the confession; that is, names other than the defendant Malinski and the defendant Beitler. You have no right to speculate as to who Mr. X and who Mr. Y are. Is that clear? You have no right to jump to any conclusions as to who Mr. X and Mr. Y are. As far as you know, it may be Christopher Columbus, it may be John Doe, it may be one of five or five hundred million people. Is that clear? You have no right to infer that the X and the Y referred to are either or both of the other defendants, namely, the defendant Rudish and the defendant Indovino. Now, I cannot impress that upon you too strongly. I believe my English is simple and it is understandable, and I am addressing you jurors in a forthright manner. I am going to conduct this case in the manner provided by law and in fairness to everybody concerned. Each defendant's case must be judged on its own merits, and only the evidence that applies to him must be considered, and no other evidence. The jury has no right to guess or surmise. The jury's verdict must be based only on evidence. I have cautioned you in a manner that cannot be mis-

understood. Now, when you hear this confession read the X and the Y are anonymous persons, and you have no right to even guess as to who they are. Can I say more than that, Mr. Geoghan? Can I say more than that, Mr. Carabba?"

Brief colloquy followed between the court and counsel which ended thus (R. 620):

"The Court: Is there anything else you desire the Court to do?

Mr. Geoghan: *Nothing whatever, I think it is full and complete.*

Mr. Carabba: *Nothing whatever on behalf of the defendant Rudish.*

The Court: *You are both satisfied with the instructions?*

Mr. Geoghan: *Yes, your Honor.*" (Italics ours.)

The court followed a procedure that has been pursued almost without exception in the State of New York in cases of joint trials.

In *People* v. *Snyder* (246 N. Y. 491), the court pointed out:

"Throughout the trial and in his charge, the trial justice with scrupulous care protected the rights of both defendants. He pointed out to the jury that they might not consider the confession of either as against the other. The fact that one defendant has made a confession which will be admissible against himself but not against a co-defendant may be a circumstance which enters into the court's consideration of whether a joint trial would be fair (*Commonwealth* v. *Borosky*, 214 Mass. 313; *United States* v. *Ball*, 163 U. S. 662). It depends upon the circumstances of the particular case whether a jury can weigh properly the testimony produced upon the various issues that may arise in a joint trial."

In *People* v. *Fisher* (249 N. Y. 419), the court, passing upon the same issue, said:

> "Varying circumstances bear upon the soundness of discretion to be exercised under section 391 of the Code of Criminal Procedure in refusing to grant motions for separate trials. The rule is not doubtful. * * * Its correct application must rest upon the facts in each case. Prospection by the trial judge is not final. In a case where, without the existence of a confession by one defendant, the evidence against another would be too weak to justify a conviction, or even where a conviction would be doubtful, our review of the judgment would compel us to conclude that an abuse of discretion had been committed."

As we pointed out in the beginning, Rudish completely foreclosed himself from relief either in the Court of Appeals, or in this court, when he declined, in the midst of the trial, an offer of a separate trial as to him. The record discloses (R. 766-767):

> "The Court: Do I understand, Mr. Carabba, that you made a motion for a severance in this case?
>
> Mr. Carabba: No, I did not. I was under the impression that we did, and I just asked Mr. Meadow. We had discussed it.
>
> The Court: Do you make a motion for a severance?
>
> Mr. Carabba: No, I don't. *I am going to stand on this record.*
>
> The Court: *You don't want a severance?*
>
> Mr. Carabba: *Not at this time, Judge Leibowitz.* (Italics ours.)

Later, counsel for Rudish emphasized his position when the court inquired whether he wished to take advantage of *People* v. *Fiola*[13] (R. 769):

> "Mr. Carabba: I don't know anything about the Fiola case. *All I can truthfully answer, your Honor,*

13. (282 N. Y. 276.)

is that we do not wish a severance at this time." (Italics ours.)

The subject was never opened up again.

That is not all, as far as Rudish is concerned. Counsel for Rudish on the trial, in his summation, far from attacking the police conduct of the case, gave full countenance to it. He said to the jury (R. 1173-1174):

> "I am not here to pass upon or even to criticize the conduct and the deportment of the police officers in this case. You will recall that when the witness, the defendant Rudish, took the stand, he said that from the time of his arrest he told the detectives and the District Attorney that he knew nothing about this crime. You will have to say to yourselves, 'Was this Room 608 in the Hotel Bossert, a station house?' 'No.' 'Was it the office of the District Attorney?' 'No.' 'Was it a Magistrate's Court?' 'No.' It was a room used and occupied by the police, to bring whoever they suspected of having anything to do with this crime, where they could work out the process of giving a man a workout. That is all it is. A reputable hotel in this County used by the police to question and question and question for hours those that were accused of crime. I find no fault with that. I find no fault with the police using every honest effort to bring to justice those who have committed this cowardly crime of killing Leon Fox, whom I have had the pleasure of knowing and knew personally."

In Conclusion.

We respectfully submit:

As to Malinski.

That he was accorded a fair trial. That his confession was freely and voluntarily made. That no violence was used to coerce it from him. That the issue whether it was

or not was submitted to the jury under instructions that met every legal requirement. That the district attorney's summation, or at least so much of it as has been denominated "indefensible" was acquiesced in by counsel, for reasons which we have fully demonstrated and that, therefore, no question of due process is involved.

As to Rudish.

That he has no standing on this application. That no question of a coerced confession is involved as to him, but that his conviction rests on his admissions to Spielfogel, clearly and unmistakeably pointing to his guilt. That Malinski's confession was received in evidence, under proper instructions under approved state law, that it was binding only on him and that no constitutional question is presented as to him.

II.

The petition should be denied.

Respectfully submitted,

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Acting District Attorney,
Kings County.

HENRY J. WALSH,
Assistant District Attorney,
Of Counsel.

Appendix.

Section 517, New York Code of Criminal Procedure.

"§ 517. *In what cases appeal may be taken by defendant.*

An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death, the appeal must be taken direct to the court of appeals. * * * "

Section 1045-a, Penal Law of the State of New York.

"§ 1045-a. *Life imprisonment for felony murder; jury may recommend.*

A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life."

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 367

MORRIS MALINSKI and SIDNEY RUDISH,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF.

Opinions Below.

The petitioners were convicted of murder in the first degree in the County Court of Kings County, State of New York, after a trial which lasted eleven days, and were thereafter sentenced to the death penalty. On appeal to the Court of Appeals, the highest court of the State, the judgments were affirmed by a divided vote of four to three. The majority and minority opinions of the court are reported officially in 292 N. Y. 360 (R. 1479-1503). Motions to amend the remittitur were granted with an opinion

reported officially in 292 N. Y. 686 (R. 1506-1507), and thereafter motions for reargument of the appeal were denied without opinion (293 N. Y. 695; R. 1567).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended [28 U. S. C. A. Sec. 344 (b)], upon the claim that petitioners were denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The precise character of the Federal rights specially set up and claimed in the Court of Appeals is set forth in the court's opinion amending the remittitur which, in its pertinent parts, reads as follows (292 N. Y. 686; R. 1506-1507):

> "Questions under the constitution of the United States were presented and necessarily passed upon.
>
> "The defendant Rudish contended that the admission of the confession of his co-defendant Malinski in evidence against Malinski was a denial to the defendant Rudish of due process under the Fourteenth Amendment to the constitution of the United States.
>
> "The defendant Malinski contended that the admission in evidence of his alleged confession and his identification of the 'murder car' and his description of the events at the scene of the murder violated his rights under the Fourteenth Amendment to the constitution of the United States.
>
> "This court held that the rights of neither defendant under the Fourteenth Amendment to the constitution of the United States had been violated or denied. (See 292 N. Y. 360.)"

Questions Presented.

The petitioners raise the following questions (Petitioners' Brief, p. 3):

> (a) Whether "the circumstances under which a confession was obtained from Malinski and put in evi-

dence" constitute a denial of due process of law in violation of the Federal Constitution.[1]

(b) Whether "the conduct of the prosecuting attorney and his summation to the jury constitute such a violation of the fundamental concepts essential to a fair and impartial trial" as to be a denial of due process of law.

(c) Whether "the conduct of the judge, his charge, and his failure to charge fully and intelligently on certain phases of the case" constitute a denial of due process of law.

Statement of the Case.

At about eleven o'clock on the night of February 15, 1941, Leon Fox, a police officer of the City of New York, was shot and died shortly thereafter as a result of bullet wounds. At the time of the shooting the police officer, in the course of his duties, was accompanying the manager of a moving picture theatre who was carrying the day's receipts to a bank.

The testimony of the manager shows that, as he and the police officer were walking toward the bank, a man jumped out of an automobile which was parked at the curb, struck the manager and shot the officer. The manager attempted to flee with the bag containing the money, but he threw it away when the man who had shot the officer said: "Drop the bag, or I'll drop you." The robber then picked it up, jumped back into the car, and the car sped away. The police officer, as he lay upon the sidewalk, fired about six shots in the direction of the departing car (R. 127-147).

In about an hour an abandoned car with a cloth top (R. 136, 142, 189-190) and a bullet hole in one of its

[1] It should be noted, in passing, that no confession was made by Rudish to any public official, that the trial court, in receiving Malinski's confession in evidence, carefully instructed the jury that it was to be considered against Malinski alone (R. 618-620), that counsel for Rudish expressly approved the instructions (R. 620) and at the close of the People's case rejected an offer by the court to grant Rudish a separate trial (R. 767-769).

fenders (R. 161, 174) was discovered a short distance away from the scene of the crime. It was identified by several eye-witnesses as the car used by the men who committed the murder (R. 133, 136, 142-143, 151, 189-192). Between its front wheels there was also found a brown fedora hat (R. 176-177). Investigation further disclosed that the car had been stolen about two hours before the crime was committed (R. 207-213).

No eye-witness was able to identify the men who took part in the crime. One of them, however, did say that after hearing five or seven shots his attention was attracted by a fleeing car in which he saw three men, two of them in the front and the third in the back with his head "bent over" (R. 194-196).

Aside from Malinski's confession to the district attorney and the police, which we shall discuss hereafter, the evidence established that Malinski and Rudish and one Abraham Beitler were the participants in the murder. One Joseph Indovino was also involved as the so-called "tipster" (R. 298) to the robbery, but he did not go to the scene of the crime because he was too well known in that neighborhood (R. 227-230).[2]

In November, 1942, Malinski, Rudish and Indovino were indicted for the murder.[3] They were tried jointly and all three were found guilty as charged.[4]

[2] Another individual, David Yellin, who aided in the preparation of the crime, testified for the People and was held to be an accomplice as a matter of law (R. 1347).

[3] Beitler was not indicted because in October, 1941, he, while engaged in an affray in a New York hotel, shot a man, attempted to shoot a policeman and then committed suicide (R. 714-716).

[4] As to Indovino, however, the jury recommended life imprisonment (R. 1417) which recommendation was followed by the trial court. Since there is no direct appeal to the Court of Appeals except where the penalty is death (N. Y. Code Crim. Proc., sec. 517), his appeal was brought to the Appellate Division of the Supreme Court, Second Judicial Department, where it was argued on November 6, 1944. No decision has yet been rendered.

Evidence Apart From Malinski's Confession to the District Attorney and the Police.[5]

To evaluate the evidence in true perspective it will help if we first note the background of two of the People's witnesses and their relationship to the petitioners.

In December, 1941, Nathan Spielfogel, also referred to as "Slip", and David Yellin were sentenced to State prison for robbery committed while armed. Yellin received a sentence of ten to twenty years (R. 221, 246). Spielfogel, being a second felony offender, received a sentence of thirty to sixty years (R. 295).

Yellin and Rudish knew each other for twelve to fifteen years (R. 222) and were "very close friends" (R. 282). Spielfogel was the friend of Malinski for about six years (R. 296, 962). "As an outgrowth of his intimacy with Malinski and of their criminality together, he and Malinski had agreed that if one went to prison the other would contribute to the support of the family of the one incarcerated. Malinski broke that agreement after partial performance of it" (Conway, J., 292 N. Y. 360, 365; R. 375-376).

---

[5] At the trial Malinski repeatedly asserted that his confession to the district attorney and the police was false (R. 554, 955, 956, 960, 961, 967, 968) and in his brief to this Court (p. 10) he again emphasizes that testimony. At page 14 of his brief, however, he urges that "Whether the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider. The confession was introduced over the defendant's objection. If such admission of this confession denied a constitutional right to defendant the error requires reversal." We shall later show that, apart from the other evidence in the case, the Court of Appeals was amply justified in rejecting the contention that the use of Malinski's confession was a denial of due process of law. At this point it suffices to note that "Asserted denial (of due process of law) is to be tested by an appraisal of the totality of facts in a given case" (*Betts* v. *Brady*, 316 U. S. 455, 462). It follows, therefore, that a consideration of the other evidence in the case is material to the question presented for review.

Both Spielfogel and Yellin were serving their terms when the district attorney was informed that they knew who had killed the police officer (R. 1493). Neither one of them was given any promise or even intimation that anything would be done to lessen their sentences or to reward them in any other way for becoming witnesses for the People (R. 264, 275, 373, 401-402). And both of them testified that they would not commit perjury where men's lives were at stake (R. 264-265, 373).

(a) Malinski's disclosures to Spielfogel.

Spielfogel testified that about 1:30 o'clock on the morning of February 16th, which was about two and one half hours after officer Fox was shot, Malinski came to Spielfogel's home without hat or coat, his hair "all thrown apart like a wild man", and said to Spielfogel: "We had a shooting match. I want to talk to you" (R. 302-304). Spielfogel then supplied Malinski with a hat and accompanied him to a nearby club. In response to Spielfogel's inquiry as to what had happened to Malinski's hat and coat, Malinski replied: "I got a coat over in the club but the hat, it is Hershee's hat. I dropped it on the hoist (which means a robbery) after I jumped out of the car" (R. 304).[6]

At the club, where they stayed for about half an hour, Malinski related how the crime was committed. He told Spielfogel that he, Rudish and Beitler drove to Coney Island where, after visiting a restaurant, they placed the automobile near the bank; that Beitler stayed on the corner and gave him a signal when the manager and the police officer were approaching; that he (Malinski) then got out

[6] It will be recalled that a hat was found under the abandoned automobile used in the robbery (R. 176-177). "The hat so found, later initialed by Malinski during a confession to which reference will be made, fitted Malinski when he was required to put it on while testifying or the jury could so have found" (Conway, J., 292 N. Y. 360, 367).

of the car and said to the cop "this is a hoist"; that the cop went for his gun, whereupon Malinski "pegged a few" and jumped into the rear of the car; that after Beitler got in they drove away, Rudish driving the car; and that they later abandoned the car and came to the club where the money was divided (R. 307-308, 310).

Malinski also disclosed that at the time of the division of the money they had a dispute as to the conduct of the robbery, Malinski insisting to Spielfogel that "I done everything I was supposed to do", that Beitler was supposed to to take the money while he (Malinski) "took the cop", but that Rudish and Beitler argued that it had been arranged for Malinski to take the money (R. 309).

In the course of that conversation as detailed by Spielfogel from the witness stand, Malinski said that he had used the "pieces" (guns) which Red Tiplet had taken from a locker uptown (R. 310); that "We used two .38's side throwers and two .45 automaties" (R. 311); and that he and Beitler each fired two shots (R. 333).

(b) Corroboration of Spielfogel by independent evidence.

Red Tiplet, referred to by Spielfogel, was the nickname of Simon Eisler whose testimony appears at pages 447-470 of the Record. The significance of his testimony is described by Judge Conway as follows (292 N. Y. 360, 367-368):

> "* * * bearing in mind that this story was told by Spielfogel in October of 1942 (he was brought to the city from Sing Sing on October 15, 1942), nearly twenty months after the commission of the crime, it is interesting to note that the District Attorney brought to the trial one Eimon Eisler who, at the time of the trial, was a corporal in the United States Army stationed at Tacoma in the State of Washington and who had never been convicted of any crime nor charged with any crime. The testimony of that man as distinguished from that of the convicts who

gave testimony against Malinski undoubtedly had great weight with the jury and was very damaging to Malinski. Eisler's nickname was Red Tiplet (a red pigeon). When he gave his testimony he had been in the Army since January 20, 1941, a period of about two and one half years. He entered the Army therefore about twenty-five days before the murder. He had known the defendant Rudish for fifteen years and the defendant Malinski for about three years. He testified that in the latter part of December, 1940, he had a talk with Malinski at the Citadel Club and that Malinski gave him a ticket to pick up a package in the Terminal and to bring it down to the club. Malinski gave him four dollars and he went uptown, picked the package up and brought it back to the club. Malinski opened it and in the package he saw four pistols: two fountain pen guns and two pistols of .38 calibre. The two .38 calibre pistols were wrapped in stockings. He was asked: 'Q. In addition to the fountain pen guns and the two .38's, did you see any other object in the package? A. There were more stockings but I don't know what was in them.' The corporal said that when he obtained the package he had not known what was in it. * * * Curiously enough the witness had never told Spielfogel nor Yellin nor any police officer about the errand on which Malinski had sent him until he was brought from Tacoma on June 12, 1943, a distance of 3,000 miles, five days before he testified on June 17, 1943. It would seem clear that the information as to Eisler could only have come to the District Attorney from Malinski through Spielfogel * * *."

(c) Additional corroboration by evidence from Malinski's brother-in-law and girl friend.

Spielfogel testified that after staying in the club for about half an hour in the early morning of February 16th he accompanied Malinski to the home of Malinski's sister

where Malinski wanted to stay for the rest of the night (R. 344, 348); that he entered the kitchen of the apartment, took a drink of water, and then walked back into the hall where he heard Malinski say to somebody: "Go back to bed" (R. 352-353).

Here again, the People put on the witness stand Malinski's brother-in-law and a young woman in whom Malinski was interested and who was living at that time with Malinski's sister and husband. The brother-in-law testified that about 1:30 or 2 o'clock in the morning of Sunday, February 16, 1941, he was aroused by a loud knock on the door; that when his wife opened the door he saw Malinski and heard him say he had shot a cop in Coney Island and had $200.00 in his pocket (R. 524-526). The brother-in-law further stated that Malinski then spoke to the young woman who was living in the apartment and heard Malinski say: "If you don't go back to bed there I give you the same dose as I gave the cops" (R. 527). Thereupon the brother-in-law ordered Malinski to leave the house (R. 527-528).

The woman testified that in the early hours of the Sunday morning in question she, too, was awakened by a banging on the door and heard Malinski ask his sister whether he could stay there for the night; that when the sister replied there was no room, he said: "We just shot a cop. We each got $200 apiece" (R. 489-490). The young woman then went into the kitchen and asked Malinski: "What did you do, shoot a cop?", to which he responded: "Get back in bed before I give you the same thing I gave the cop" (R. 490).

Malinski's sister was not called to deny any part of the foregoing testimony (R. 1484).

Malinski's Confession to the District Attorney and the Surrounding Circumstances.

Malinski had previously been convicted for attempted robbery for which he served a term of imprisonment from May 1937 to January 1940 (R. 945-946).

About a day or two after his associate Spielfogel disclosed the information heretofore related, Malinski was arrested (R. 369).[7] The arrest was made at 7:30 o'clock in the morning of Friday, October 23, 1942 (R. 552, 573) by two police officers who took Malinski to a room in the Bossert Hotel, "a leading hotel in Brooklyn" (R. 1480). Shortly thereafter Spielfogel was brought to the same place (R. 577, 950).

The police, however, did not arraign Malinski until the morning of Tuesday, October 27th (R. 553, 573),[8] which was about eight hours after Malinski made a full and detailed confession to the district attorney. This confession was recorded by a stenographer and appears at pages 621-639 of the Record.

When the confession was offered in evidence objection was made to it upon the ground that it was involuntary. The trial court, in accordance with New York procedure, then held a preliminary hearing and took testimony both for the prosecution and for the defense (R. 547-616). There being a conflict in the evidence both as to threats and the

[7] The arrest was lawful. "A peace officer may, without a warrant, arrest a person when a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it" (N. Y. Code Crim. Proc., sec. 177, subd. 3).

[8] "The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night" (N. Y. Code Crim. Proc., sec. 165). And a police officer "who wilfully and wrongfully delays to take such person before a magistrate" is guilty of a misdemeanor (N. Y. Penal Law, sec. 1844). The failure to arraign Malinski promptly was explained by Lieutenant McNally, who was in charge of the investigation, as follows: "He liked the Hotel Bossert in preference to a station house cell. I asked him if he wanted to be booked on Friday, or would he rather stay at the Hotel Bossert with his friend Slip (Spielfogel). So he chose Slip and the Bossert" (R. 580-581). The record also shows that although Spielfogel did not sleep at the hotel, he was brought there every morning (R. 581, 956).

use of violence, the court admitted the confession (R. 617).[9] Thereafter Malinski reiterated his testimony when he again took the witness stand in his defense (R. 948-961). Further contradictory evidence was offered by the People (R. 1108-1123), and the court submitted the question as to the voluntary character of the confession to the jury under instructions which were approved by the Court of Appeals (292 N. Y. 360, 371, 374-375).

On the question of arraignment without unnecessary delay the court charged as follows (R. 1376-1377):

> "Lieutenant McNally claims that he was willing to arraign Malinski before a Magistrate on the very day, namely, Friday, when Malinski was first brought to the Bossert, but that Malinski stated that he would rather stay at the hotel with his friend Spiegel than be thrown into a cell in a police station.
>
> Be that as it may, I charge you that it was the duty of the police to arraign the defendant before the nearest Magistrate without unnecessary delay, and, further, that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor.
>
> But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession if made. If you should find

[9] "A confession of a defendant * * * can be given in evidence against him, unless made under the influence of fear produced by threats, * * * " (N. Y. Code Crim. Proc., sec. 395). "Delay in arraignment does not exclude a confession." (*People* v. *Trybus*, 219 N. Y. 183.) Neither does the fact that officers of the law questioned the defendant persistently in regard to his connection with the crime (*People* v. *Rogers*, 192 N. Y. 331, p. 348), nor that they failed to warn him of his privileges or rights" (*People* v. *Doran*, 246 N. Y. 409, 423). "Only where the confession is made under the influence of fear produced by threats is it inadmissible" (*People* v. *Mummiani*, 258 N. Y. 394, 398).

that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27th at the Bath Beach station house."

With respect to the stenographically transcribed confession the court said (R. 1380-1381):

"Although Malinski does not deny that he made this confession, his contentions are:

That the confession is valueless as evidence against him because it was made by him due to force and intimidation and fear visited upon him by the police authorities, and implied coercion because of the manner in which they kept him in custody from the time of his apprehension until he made this confession. You must find beyond a reasonable doubt that this confession was a voluntary one before you would have the right to consider it.

Malinski then urges a second objection to this confession. His claim is that the statements contained in this confession implicating him in this crime are untrue.

Under the law, therefore, you will determine, first whether or not this confession is voluntary. If you find it was involuntarily made, or if you have a reasonable doubt about it, then you will disregard the confession entirely. On the other hand, if you find beyond a reasonable doubt that the confession is a voluntary one, you will then determine whether or not the statements inculpating the defendant, therein contained, are true. If you shall have resolved both of these questions in favor of the prosecution, then and only then will you consider the confession in determining the guilt or innocence of the defendant of the crime of murder in the first degree."

Since the determination by the trial court and the jury, approved by the highest court of the State, will be accepted

by this Court where the evidence is in conflict,[10] "or where different inferences may fairly be drawn from admitted facts",[11] it is essential to draw a sharp line between the disputed and undisputed facts.

(a) The disputed facts.

Malinski claimed that on Friday, October 23rd, at the Bossert Hotel, he was forced to strip, and that after he protested his innocence, the police beat him severely and threatened to throw him out of a six-story window, in order to extort a confession from him. He charged that several of the detectives beat him with their fists and struck him across his face, head, back and other parts of his body (R. 549, 551, 555-561, 567-568). His version of a conversation he had with Spielfogel on that day was that when the police granted his request to speak to Spielfogel (R. 566) he and Spielfogel went into the closet of another room where Spielfogel told him, in substance, that if he wanted to save himself from a beating, he had better tell the police what the police would like him to say, that he (Spielfogel) knew he was innocent, but that under the circumstances it was the best course to pursue (R. 565-566, 951-952). He then testified that, in order to save himself from a terrific beating, and with the aid of Spielfogel who in Yiddish related to him the details of the crime, he finally made an oral confession to the police late that evening (R. 565-566, 553-554) and told them "Whatever Spielfogel told me to say" (R. 952).[12]

[10] *Lisenba* v. *California*, 314 U. S. 219, 238.

[11] *Lyons* v. *Oklahoma*, Law. Ed. Advance Opinions, vol. 88—No. 16, p. 1070, 1079, decided June 5, 1944.

[12] The details of that oral confession were never offered in evidence. As stated in petitioners' brief (p. 20), "No attempt was made to prove the details—to show what he said." And we also agree with petitioners' statement in their brief (p. 13) that "It is the confession taken on October 27th, by a stenographer at 2:10 A. M. at the Bath Beach station house and his identification of the murder car and his description at the scene of the murder with which this Court alone is concerned."

The testimony of the police and Spielfogel, on the other hand, is in direct conflict with Malinski's accusations. Although the police frankly admitted that Malinski was stripped, they denied that force was used. Malinski, they testified, removed his clothes pursuant to their request (587, 605), and the reason for the request was as follows: "we did not know whether any of the men in connection with the Fox case had been shot, so I had him stripped. I had him strip himself for that purpose. * * * To see if he had any bullet wounds * * * bullet scars" (R. 584).[13] It should also be noted that Malinski admitted that after he was stripped the police "looked all over" his body (R. 564).

In addition, the police emphatically denied the use of force or threats against Malinski at any time from the moment of his arrest until his arraignment on October 27th (R. 572, 592-593, 596, 603-605, 611, 613-614).

We now turn to Malinski's testimony that all of the information he gave to the police and to the district attorney was the result of the advice he received from Spielfogel and that none of this information came from personal knowledge or experience (R. 951-952, 955-957, 961, 987). In this respect the testimony of Malinski's brother-in-law (R. 526-528), of the young woman in whom he was interested (R. 489-490), of Simon Eisler (R. 447-470) and of Spielfogel (R. 302-311, 333)—which disclosed Malinski's incriminating conduct and admissions shortly before and immediately after the murder—conclusively blocked Malinski's attempt to exculpate himself from any participation in the crime. In addition, Spielfogel specifically denied that he ever spoke Jewish to Malinski or that he ever told him what to say (R. 1108). Spielfogel also contradicted the

[13] "The stripping of Malinski for that purpose was concededly proper", particularly in view of the fact that officer Fox had fired several shots in the direction of the fleeing automobile and that at least one shot had struck the car (Conway, J., 292 N. Y. 360, 372). Insofar as the prosecuting attorney's improper remarks on this point in his summation to the jury are concerned, we say that they are indefensible; we shall discuss them later.

"closet" conversation as related by Malinski. He testified that sometime during the afternoon of Friday, October 23rd, Malinski asked for permission to talk to him. When the request was granted they went into another room (R. 322, 390) where the following conversation took place (R. 322):

> *Malinski:* "Listen, Slip, I know they got Jake in the other room otherwise they cannot know so much. They know too much already. I might as well go out there and tell them the rest and get it over with."
>
> *Spielfogel:* "Well, you are over 21. You know what the score is; do what you want."

Thereupon, according to Spielfogel, Malinski and the police lieutenant had the following discussion (R. 322-323):

> *Malinski:* "I will tell the truth, but I don't want to go to the chair for this."
>
> *Lieutenant:* "I cannot promise you anything. This is a police case. You will have to take your chance. Whatever happens, happens."
>
> *Malinski:* "I would like to bring a rabbi in or a fellow by the name of Nat Math.[11] I would like to talk to him before I say anything."
>
> *Lieutenant:* "This is my case. You have got to take your chances."

Thereafter, said Spielfogel, Malinski "started to tell everything" (R. 323).

In an attempt to bolster his accusation of police brutality Malinski testified on cross-examination that he asked for a doctor on Saturday, October 24th, and that his request was denied (R. 562). He stated that on the preceding day, when he was allegedly beaten, he did not feel that he needed

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[11] Nat Math was then an assistant district attorney of Kings County (R. 1486).

medical attention (R. 563). Further cross-examination, however, elicited the answer: "I didn't have no injuries" (R. 563). Why then did he ask for a doctor? His reason was as follows (R. 562):

> "I was sick. I didn't do nothing and I couldn't drink nothing and they were telling me what I was being charged with and I was sick to my stomach."

Lieutenant McNally frankly admitted that he denied Malinski's request to see a doctor (R. 583), but testified that Malinski said he had "a nervous stomach" and requested a doctor "fifteen minutes after he was brought in" and told "he was going to be questioned on the Fox case" (R. 583).[15] McNally further testified that thereafter Malinski did not renew his request (R. 583) and that during Malinski's entire stay at the Bossert he ate and rested (R. 672).

On Sunday, October 25th, the police, together with Malinski and Spielfogel, entered an automobile near the hotel. The chauffeur, directed by Malinski, drove the car on the route Malinski took the night of the murder to Coney Island, where Malinski pointed out a restaurant in which he and his companions had tarried on the night when Fox was shot. He then directed the officers to the scene where the shooting occurred, and there identified several points of importance in connection with the events of that night (R. 644-646, 654-655).

Malinski's reply to this evidence was that he did not direct the chauffeur how to proceed, and that Spielfogel, speaking to him in Jewish, pointed out to him the restaurant and related to him more of the details of the robbery and the killing (R. 957, 974-975, 983-984).

[15] "Realization of the horrible deed which had been committed and that at last he had been discovered and was in the hands of the law must have had some effect even upon a hardened criminal. The onrush of the appreciation of guilt and its consequences have at times a tremendous debilitating effect" (*People* v. *Doran*, 246 N. Y. 409, 422).

On Monday afternoon, October 26th, Malinski was taken to the garage of the property clerk of the police department, where the car used in the robbery was stored. The officer who took him there testified that there were about 150 automobiles in the garage, and that he asked Malinski to pick out the car that was used in the robbery. Malinski, he testified, carefully looked around the garage and finally pointed to the Ford with a cloth top, and said that the door had been difficult to open and that he would try it and make doubly sure that this is the car used that night. Thereupon, Malinski tried the door and, finding it to be the same, positively identified the car without any help or suggestion from the police or any other person (R. 642-644, 658-659).

Malinski's version was that he had been shown a picture of the car before he went to the garage and that when he arrived there the following occurred (R. 958-959):

> "* * * I went in there and they were walking around and the next thing I knew he stopped at a car. He said, 'Does that look like the car?' He showed me the picture of the car. It looked the same so I looked at it and I said, 'I don't know.' He said, 'Open the door,' *so I took my handkerchief out of my pocket and I went over and opened the door. He said, 'why are you using the handkerchief?' I said, 'I am being framed up. I am not going to leave my prints on the car.'*
>
> Q. *Did you tell him why?* A. *Yes.*
>
> Q. *What did you tell him?* A. *I told him I was never in the car. I never seen the car.*"

And on cross-examination he reaffirmed that he said to the police officer (R. 988):

> "*I know all about this business and I am not going to let you frame me by putting my bare hand on the handle. I am going to use a handkerchief.*" [16]

[16] It is impossible to reconcile this testimony with Malinski's other claim that he had been beaten and threatened by the police and that his confession was the product of fear.

Several hours later Malinski made a full and detailed confession to the district attorney which was recorded stenographically at two o'clock in the morning of Tuesday, October 27th (R. 621-639). As already noted, Malinski's claim was that this confession was false, was made while under the influence of fear produced by threats, and that all the information contained therein was supplied by Spielfogel.

The extent to which Malinski strained credulity with his story that he said and did whatever Spielfogel told him is illustrated by the following incident. The written confession shows that Malinski identified the hat which was found under the abandoned car used in the robbery as being the hat he wore on the night of the commission of the crime (R. 637-638). The confession then shows (R. 639):

> "Q. Will you put your initials inside of the hat? A. Put it where?
>
> Q. Just inside the sweatband. A. (Witness complies.)
>
> Q. That is 'M. M.' which you have written in pen and ink on the inside of this sweatband? A. Yes, sir."

At the trial when he was asked about placing his initials in the hat he gave the following answers (R. 955):

> "Q. Now you put your initials in that hat did you not? A. In the police station.
>
> Q. That was on October 26th? A. The 27th, in the morning.
>
> Q. The 27th of October? A. That is right.
>
> Q. And you put your initials in because you were told to do it by the police? A. *Spielfogel says: 'What is the sense? They are only going to go to work on you again. Put them in there; that is nothing'.*"

The written confession lists the names of the persons "Present" at the time of the taking of the statement. Spiel-

fogel's name is not among them (R. 621). After the confession was read in evidence counsel for Malinski said he did not want to cross-examine the stenographer (R. 640). And later Malinski admitted the following (R. 975):

> "Q. Where was Spielfogel at the time you were giving this statement? A. *He was in the next room*."

(b) The undisputed facts.[17]

Malinski admitted that he had "no injuries" (R. 563-564). When he was arraigned in the Felony Court he made no complaint whatever to the presiding judge that he had been beaten, threatened or intimidated (R. 569, 615). Nor did he make any complaint to the district attorney who took the confession (R. 562). On the contrary, he told the district attorney that he was making the confession volun-

[17] At this point we call the Court's attention to a very serious error in petitioners' brief. At page 16 thereof appears the following:

> "What more conclusive evidence that the confession was the result of coercion and induced by threats could be furnished than the admission of the People. In the Brief in Opposition to the petition for certiorari it is said (p. 27):
>
> 'Malinski says he was beaten; the police deny that, the district attorney is candid enough to say that the police let him believe he was going to be beaten for the psychological effect such a mode of dealing with him might have upon him.'"

The author of the brief in opposition to certiorari never made any such concession. A reading of that part of the brief from which petitioners have clipped the above quoted excerpt shows that the author was illustrating how *the jury*, in view of the prosecutor's summation, might have reasoned if it decided to reject the confession as involuntary. This is unmistakably shown by the fact that immediately preceding the excerpt quoted by petitioners appears the following: "In other words, *the jury could have reasoned*"

tarily, that nobody forced him to do anything, and that he had not been mistreated (R. 639).[18]

It is also undisputed that Rudish and Indovino were arrested one day after Malinski's arrest (R. 1486). Yet, neither Rudish nor Indovino claimed to have been assaulted, although confined in the same hotel with the same officers, and neither of them confessed to the police or the district attorney (R. 1487).

Finally, it is conceded that on Friday, October 23rd, after Malinski took off his clothes so that the police could see whether there were any scars of bullet wounds on his body, he was compelled to remain in his shorts or "B. V. D.'s" and a blanket for the greater part of that day. But it is also beyond dispute that the oral confession which he made to the police on Friday was not used. As stated at page 20 of petitioners' brief, "No attempt was made to prove the details—to show what he said." It is also undisputed that Malinski was not arraigned until Tuesday, October 27th, about four days after his arrest, and that during that period of time he was frequently questioned. And it is admitted that with the exception of being permitted to speak every day with his former associate, Spielfogel, he was held incommunicado.

The Decision of the Court of Appeals.

Although the Court of Appeals affirmed the judgments by a divided vote it is noteworthy that the court was unanimous on two propositions:

(1) As Chief Judge Lehman, writing for the minority said,

[18] Under such circumstances the falsity of Malinski's claim that he had been beaten and threatened is evident. For "when no bruises are seen on the defendant's body and when with full opportunity he makes no prompt complaint to the officials or friends", it is evidence "that the defendant's tale of threats or beating is false and that the confession is voluntary." (*People* v. *Barbato*, 254 N. Y. 170, 173).

"Here we are agreed that a finding by the jury that the defendant's confession, though obtained while he was unlawfully detained without arraignment, is not against the weight of the evidence" (R. 1501).

(2) The court was unanimous in holding that neither Malinski nor Rudish was denied due process of law under the Federal Constitution.

Argument.

As to Malinski.

The question as to whether a confession is the result of coercion, physical or phychological, or the offspring of reasoned choice is often a difficult and elusive inquiry (*United States* v. *Mitchell*, 322 U. S. 65, 68). "No formula to determine this question by its application to the facts of a given case can be devised" (*Lyons* v. *Oklahoma*, 88 Law. ed. Adv. Op. No. 16, p. 1076, 1079). As a general guide this Court has held that even where there was abuse of power by officers of the law a State has the right to use the confession if the evidence negatives the view that the accused had "so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny or to refuse to answer" (*Lisenba* v. *California*, 314 U. S. 219, 241).

A reading of the evidence in the case at bar leaves no room for doubt that when Malinski made his confession on October 27th he was acting as a free agent and not under duress. There is a sharp conflict in the evidence as to his state of mind at the hotel on Friday, October 23rd, and there would be room for argument if the oral confession then made had been used by the State. But it was not used. Any doubts that might have existed as of that time are quickly dispelled by the subsequent events.

A conclusive illustration is the testimony of Malinski himself describing his conduct on Monday afternoon in the

garage of the property clerk of the police department. It will be recalled that Malinski testified that when the police asked him to open the door of one of the cars he took a handkerchief from his pocket and opened the door, and that upon being asked why he used a handkerchief he replied:

> "I am being framed up. I am not going to leave my prints on the car" (R. 958-959).

Such conduct is consistent only with self-possession, coolness, acumen and lack of fear. It is inconsistent with "deprivation of free choice to admit, to deny or to refuse to answer".

Moreover, if the police officer's testimony that Malinski identified the car as the one he used in the robbery and made the identification without any suggestion from anybody is true, then Malinski's incriminating identification clearly constitutes a voluntary confession. If on the other hand Malinski's testimony is true, then it is equally clear that at least by Monday afternoon he was in full control of his mental faculties, defiant and completely without fear.

At all events, one thing is beyond question and that is that there is a conflict of evidence on the issue of voluntariness of the confession. Under such condition the question of credibility is not for this Court to determine but for the trial court and jury (*Lyons* v. *Oklahoma*, *supra*, p. 1079-1080; *Lisenba* v. *California*, *supra*, p. 348).

The District Attorney's Summation.

In the prevailing opinion of the Court of Appeals, the author thus discusses the subject:

> "It is next urged upon us that the Assistant District Attorney gave his views as to the reason why Malinski was left in his underclothes and we are asked to reverse because of that. The three defendants on trial were represented by experienced coun-

sel. It is true the Assistant District Attorney made the statements quoted in the dissenting opinion. The summation covers sixty-three printed pages. The first quotation is twenty-nine pages before the second. The District Attorney was interrupted by counsel fourteen times. Nearly all of those objections were made by the attorney for Malinski. Yet no interruption by objection was made to the remarks quoted. *That is no excuse for the remarks but it is some indication of the fact that none of the counsel took them seriously.* The remarks were indefensible. Whether under the circumstances a new trial should be ordered for Malinski because of these disconnected and disjointed utterances which at the time of their utterance brought not a single one of the counsel to his feet to make objection, is a matter of judgment. Our judgment is that the verdict should stand and be affirmed. Even apart from the fact that it did not appear important enough to counsel to cause them to register an objection immediately, the effect of the utterances it seems to us would inure to the benefit of Malinski rather than against him and they did not relate to Rudish or Indovino." (Italics ours.)

The record fully supports Judge Conway's observations. It is true that none of counsel took the objectionable remarks seriously, either as they were uttered, or as the summation ended. Thus, at the close of the summation, counsel for Malinski took exception to the reference to Malinski's sister and the failure to call her as a witness and the argument that damaging testimony would have been elicited from her, if she had been called. The court sustained the objection and instructed the jury to disregard the argument (R. 1311). At the same time the court denied a motion for the withdrawal of a juror (R. 1311).

As we turn to counsel's interruptions of the summation, we find that some, not too serious, objections were made to references to the testimony. They amounted simply to a

colloquy between court and counsel and the result seems to have been satisfactory.

Then, we find that the district attorney, referring to Shirley Di Pisa, argued (R. 1268):

> "Where is his sister Shirley Di Pisa? Where is that girl? Where is that woman?"

Counsel objected to this argument and was overruled. Again the district attorney's argument was (R. 1290):

> "* * * and I say, if there was any answer to it, and it did not happen, the sister, Mrs. Di Pisa, should be in here."

Again counsel objected to the argument. The objection was overruled (R. 1290). The district attorney continued:

> "And if she is not here, you can draw the inference that her testimony would be damaging to him."

Counsel again objected, but no ruling was made. However, as we have seen, the court, at the conclusion of the summation, reversed itself as to the legal effect of Mrs. Di Pisa's absence.[19]

The district attorney, discussing Kovner's testimony, argued (R. 1293):

> "* * * he saved these three defendants from being killed at the hands of Beitler—why would he save them one year and then come down here from Attica prison, and try to convict them of murder."

Counsel for Malinski objected to the statement and the court upheld him, saying (R. 1293):

> "The jury will disregard the District Attorney's statement unless it is borne out by the fact. The jury's recollection of the evidence will control."

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[19] The ruling was in Malinski's favor, but it was incorrect (*People v. Leonardo*, 199 N. Y. 432, 446).

The district attorney later argued with respect to the psychiatrists' examinations of Spielfogel "and the others", and the fact that it is a common practice for criminals to lie to such examiners (R. 1304):

> "Of course they lie about these things. These men told you they are up in the 'bug house'. Indovino says he was up in the 'bug house'."

The objection of counsel for Indovino to the argument was sustained.

It is plain, therefore, that counsel did not hesitate to interrupt the district attorney's summation, but the interruptions were upon immaterial things, while the more important ones—the "indefensible statements" as they have been characterized—were entirely ignored. We repeat, it is true, therefore, that counsel, at least as they were uttered, did not take them seriously.

We turn now to what happened at the close of the summation. Counsel for Malinski asked for the withdrawal of a juror and the declaration of a mistrial "upon all the other exceptions taken during the course of the summation". Then occurred (R. 1311):

> "The Court: What other points do you have so that there will be no mistake?
>
> Mr. Solovei: The ones I made during the summation.
>
> The Court: Repeat them.
>
> Mr. Solovei: I don't know. I made them during the time I got up.
>
> The Court: Repeat them.
>
> Mr. Solovei: I cannot remember now. The record will show.
>
> The Court: The motion is denied."

Thus far where is there any indication, anywhere, that counsel regarded the "indefensible statements" seriously?

One of counsel for Rudish now interposed an objection to the district attorney's argument. The court pointed out

that it was mere argument and overruled the objection (R. 1312). Thus far, counsel for Rudish, too, took no occasion to voice their objections to any of the district attorney's "indefensible statements".

One of counsel for Indovino now objected to the summation "in its entirety". The court asked counsel to point out what he had in mind (R. 1313). A long colloquy ensued in which parts of the testimony were discussed. Finally, counsel for Indovino objected to the district attorney's statement that "there is nothing in holding these defendants for sixty hours or more without arraigning them". The court sustained the objection (R. 1314). Further lengthy colloquy followed. No reference is made therein to the "indefensible statements". It was not until the very end that one of counsel for Rudish objected to the remarks of the district attorney with respect to the detention of Malinski as "highly improper, and illegal". The court inquired:

> "Does Malinsky's counsel make an objection?"

Counsel for Malinski vaguely replied:

> "I made my objection on the record."

We have seen that he did not. Then, plainly as an afterthought, counsel asked for the withdrawal of a juror and the declaration of a mistrial on the basis of the district attorney's remarks (R. 1320). The motion was denied. The court acted within its discretion.

> "There can be no doubt as to the power of the trial court, in the exercise of a sound discretion, to declare a mistrial and to discharge the jury before the final submission to them of the issues, when, in the opinion of the court, matters have arisen during the course of the trial which make such procedure advisable. This is one of the ordinary powers resident in the court; and while the question of the

proper exercise of the power is open to review, there is no question that the power does exist" (*People ex rel. Herbert* v. *Hanley*, 142 App. Div. 421).

"We have no statute defining the limitation of the exercise of that discretion" (*People* v. *Montlake*, 181 App. Div. 578).

We believe we have proved that counsel did not take the district attorney's "indefensible statements" seriously.

If counsel were as unperturbed as the record discloses they were about the objectionable remarks of the district attorney when uttered and asked for no ruling upon them, it is plain that the complaint later made concerning them, and now repeated, is not in all sincerity.

We are aware that this court is not concerned with the district attorney's summation and would have no control over it ordinarily, and that its only significance, as a Federal question, goes to the question of whether or not it is true that Malinski was coerced into the confession he made to Mr. Hefferman and therefore denied process of law. The only reason we have referred to counsel's quiescent reaction to the summation and failure on the part of Malinski's counsel to voice any objection to the "indefensible statements", is that it is fair, sound argument on Judge Conway's part when he says it seemed that the district attorney's utterances "would inure to the benefit of Malinski rather than against him".

These remarks inured to Malinski's benefit for this reason:

It was for the jury to determine whether or not Malinski's confession was voluntary. Malinski's claim was that it was not. The issue was met by the testimony of the police officers that he was not beaten or coerced. If the district attorney conceded that the police endeavored to induce in Malinski a belief that he was going to be beaten, if the district attorney went that far, then, if the scales were evenly balanced, the jury might well have accepted Malinski's version of the circumstances under which the

confession was obtained. It was the jury's right to accept it or reject it. In other words, the jury could have reasoned:

Malinski says he was beaten; the police deny that; the district attorney is candid enough to say that the police let him believe he was going to be beaten for the psychological effect such a mode of dealing with him might have upon him.

The jury might well have reasoned that the district attorney's concession lent verity to Malinski's claim and might have accepted his testimony in its entirety as truthful.

We say it is a fair conclusion that that was the attitude of Malinski's counsel in not interrupting his opponent; that he felt that, instead of hurting Malinski, the district attorney's argument helped him and he was willing, by remaining silent, to speculate that such an effect would follow.

Finally, in so far as Malinski is concerned, the majority opinion in the case at bar is in consonance with *People* v. *Slover* (232 N. Y. 264):

> "We have assumed in each case on its particular facts that the jury were not affected by such matters, but by affirming the judgment of conviction we have not approved the conduct of the district attorney. We have dealt with it as the result of 'well-intentioned though misguided zeal' which probably was unheeded by the jury and had no inference on their final action, while in the case of a vigorous dispute over a defendant's mental capacity we have not hesitated to order a new trial for such excesses on the part of the prosecutor. (*People* v. *Esposito*, 224 N. Y. 370. See, also, *People* v. *Mull*, 167 N. Y. 247; *People* v. *Wolf*, 183 N. Y. 464, 472.)"

The court, earlier (*People* v. *Conklin*, 175 N. Y. 333) had said:

> "The case must be quite exceptional where a question of law, reviewable in this court, is presented, based upon the address of the prosecuting officer."

We submit that this record does not present such an exceptional case.

In *People* v. *Watson* (216 N. Y. 565) the prosecutor advanced this extraordinary suggestion to the jury:

> "*Now there is no sense in burdening the state with this man if he is guilty of murder in the first degree. If you are satisfied that he is guilty of murder in the first degree there is no sense in doing that.*" (Italics ours.)

The court, in condemning the appeal, pointed out that no exception was taken to it but that it had the power, nevertheless, to disregard the omission. In refusing to avail itself of its power, the court said:

> "The possibility of the defendant's substantial rights having been affected is materially lessened when the trial court expressly directs the jury to disregard such statements."

We submit that the trial court here fully protected the petitioners' rights in virtually every instance in which the court's attention was called to remarks by the district attorney that might have the effect of prejudicing them.

As to Rudish.

That Rudish has no standing here, is, we believe beyond cavil. Rudish did not make a formal confession. The only confession he made is to be found in his admissions to Spielfogel before and after the commission of the homicide. Therefore, there is no question of due process involved as to him, because there is nothing that he said that was coerced from him in any manner. All that he said was said freely and voluntarily. It is sought to invoke the due process amendment in Rudish's favor, however, because, it is said, the "device" by which the court suppressed the names of his confederates in Malinski's con-

fession as it was read to the jury proved "futile". In support of the claim that, therefore, Rudish's rights were prejudiced, *Anderson* v. *United States* (318 U. S. 350) is cited. An excerpt of the opinion is set forth. What is not set forth is its context:

> "So also, while the trial judge appeared to admit the confessions 'only to be used against the persons who made them' his charge bound the jury to no such restricted use of the confessions. On the contrary, from what the trial judge told them the jury had every right to assume that in ascertaining the guilt or innocence of each defendant they could consider the whole proof made at the trial. There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others."

That is not the situation here. Before we proceed to discuss what happened here, we beg leave to point out that neither *Anderson* v. *United States*, *supra*, nor *Viereck* v. *United States* (318 U. S. 236) has any application here. Therefore, no Federal question is involved in Rudish's case.

"Matters of this sort are addressed to the discretion of the trial judge" (*Stroud* v. *United States*, 215 U. S. 15, 20), and where the decision is that of a state court it is not subject to review here (*Barrington* v. *Missouri*, 205 U. S. 483; *Thomas* v. *Texas*, 212 U. S. 278, 281-282).

In the case at bar as Malinski's confession was about to be read to the jury, when counsel for Rudish (Mr. Carabba) and Indovino (Mr. Geoghan), asked that the jury be instructed that the confession was binding only on Malinski, the court responded (R. 618-620):

> "I am going to make certain observations, and I am going to ask the jury to pay strict heed to what

I say. You are about to hear an alleged statement read. The Court has together with counsel read that statement, and the Court is forewarned as to what it contains. You will hear read matters concerning a Mr. X and Mr. Y. Those names, Mr. X and Mr. Y, have been substituted by order of the Court for names in the confession. Those names have been deleted by order of the Court from the confession: that is, names other than the defendant Malinski and the defendant Beitler. You have no right to speculate as to who Mr. X and who Mr. Y are. Is that clear? You have no right to jump to any conclusions as to who Mr. X and Mr. Y are. As far as you know, it may be Christopher Columbus, it may be John Doe, it may be one of five or ~~five~~ hundred million people. Is that clear? You ~~have~~ have no right to infer that the X and the Y referred to are either or both of the other defendants, namely, the defendant Rudish and the defendant Indovino. Now, I cannot impress that upon you too strongly. I believe my English is simple and it is understandable, and I am addressing you jurors in a forthright manner. I am going to conduct this case in the manner provided by law and in fairness to everybody concerned. Each defendant's case must be judged on its own merits, and only the evidence that applies to him must be considered, and no other evidence. The jury has no right to guess or surmise. The jury's verdict must be based only on evidence. I have cautioned you in a manner that cannot be misunderstood. Now, when you hear this confession read the X and the Y are anonymous persons, and you have no right to even guess as to who they are. Can I say more than that, Mr. Geoghan? Can I say more than that, Mr. Carabba?"

Brief colloquy followed between the court and counsel which ended thus (R. 620):

"The Court: Is there anything else you desire the Court to do?

Mr. Geoghan: *Nothing whatever, I think it is full and complete.*

Mr. Carabba: *Nothing whatever on behalf of the defendant Rudish.*

The Court: *You are both satisfied with the instructions?*

Mr. Geoghan: *Yes, your Honor.*" (Italics ours.)

The court followed a procedure that has been pursued almost without exception in the State of New York in cases of joint trials.

In *People* v. *Snyder* (246 N. Y. 491), the court pointed out:

> "Throughout the trial and in his charge, the trial justice with scrupulous care protected the rights of both defendants. He pointed out to the jury that they might not consider the confession of either as against the other. The fact that one defendant has made a confession which will be admissible against himself but not against a co-defendant may be a circumstance which enters into the court's consideration of whether a joint trial would be fair (*Commonwealth* v. *Borosky*, 214 Mass. 313; *United States* v. *Ball*, 163 U. S. 662). It depends upon the circumstances of the particular case whether a jury can weigh properly the testimony produced upon the various issues that may arise in a joint trial."

In *People* v. *Fisher* (249 N. Y. 419), the court, passing upon the same issue, said:

> "Varying circumstances bear upon the soundness of discretion to be exercised under section 391 of the Code of Criminal Procedure in refusing to grant motions for separate trials. The rule is not doubtful. * * * Its correct application must rest upon the facts in each case. Prospection by the trial judge is not final. In a case where, without the existence of a confession by one defendant, the evidence

against another would be too weak to justify a conviction, or even where a conviction would be doubtful, our review of the judgment would compel us to conclude that an abuse of discretion had been committed."

As we indicated in the beginning, Rudish completely foreclosed himself from relief when he declined, in the midst of the trial, an offer of a separate trial as to him. The record discloses (R. 766-767):

> "The Court: Do I understand, Mr. Carabba, that you made a motion for a severance in this case?
>
> Mr. Carabba: No, I did not. I was under the impression that we did, and I just asked Mr. Meadow. We had discussed it.
>
> The Court: Do you make a motion for a severance?
>
> Mr. Carabba: No, I don't. *I am going to stand on this record.*
>
> The Court: *You don't want a severance?*
>
> Mr. Carabba: *Not at this time, Judge Leibowitz.*" (Italics ours.)

Later, counsel for Rudish emphasized his position when the court inquired whether he wished to take advantage of *People v. Fiola*,[20] (R. 769):

> "Mr. Carabba: I don't know anything about the Fiola case. *All I can truthfully answer, your Honor, is that we do not wish a severance at this time.*" (Italics ours.)

The subject was never opened up again.

But that is not all, as far as Rudish is concerned. Counsel for Rudish on the trial, in his summation, far from

[20] (202 N. Y. 276.)

attacking the police conduct of the case, gave full countenance to it. He said to the jury (R. 1173-1174):

> "I am not here to pass upon or even to criticize the conduct and the deportment of the police officers in this case. You will recall that when the witness, the defendant Rudish, took the stand, he said that from the time of his arrest he told the detectives and the District Attorney that he knew nothing about this crime. You will have to say to yourselves, 'Was this Room 608 in the Hotel Bossert, a station house?' 'No.' 'Was it the office of the District Attorney?' 'No.' 'Was it a Magistrate's Court?' 'No.' It was a room used and occupied by the police, to bring whoever they suspected of having anything to do with this crime, where they could work out the process of giving a man a workout. That is all it is. A reputable hotel in this County used by the police to question and question and question for hours those that were accused of crime. *I find no fault with that. I find no fault with the police using every honest effort to bring to justice those who have committed this cowardly crime of killing Leon Fox, whom I have had the pleasure of knowing and knew personally.*". (Italics ours.)

Conclusion.

Conway, J.:

> "When all is said and done these defendants had a fair trial and both confessed their guilt to persons other than the police or the District Attorney."

We humbly submit that 'twould be a piece of supererogation to elaborate on the theme.

II.

Therefore, the judgments below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1944.

Morris Malinski and Sidney Rudish, Petitioners, *vs.* The People of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[March 26, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

Malinski and Rudish were convicted along with one Indovino of the murder of Leon Fox, a police officer who, late at night, was escorting a manager of a theatre to a bank depository. The details will be found in 292 N. Y. 360. There were no eye witnesses to the crime who could identify the robbers. Malinski was implicated by various witnesses—by Spielfogel, an old friend and a criminal serving a sentence of thirty to sixty years in Sing Sing; by Malinski's girl friend; by Malinski's brother-in-law. Each testified that Malinski confessed the crime to him or her. The confessions to the girl friend and to the brother-in-law were made a few hours after the crime and were merely that Malinski had shot a cop; but the confession to Spielfogel disclosed in detail the planning and execution of the crime. Malinski denied making these confessions. Yet as the New York Court of Appeals pointed out (292 N. Y. p. 370) those confessions and other evidence of the State were sufficient, if believed, to support the conviction, wholly apart from another confession around which the present controversy turns. But the circumstances under which the latter confession was obtained raised the substantial federal question which prompted us to grant the petition for a writ of certiorari.

I.

Malinski was arrested while on his way to work on the morning of Friday, October 23, 1942. The police did not then arraign him but took him to a room in the Bossert Hotel in Brooklyn where he arrived about 8 A. M. He was immediately stripped and kept naked until about 11 A. M. At that time he was allowed

to put on his shoes, socks and underwear and was given a blanket in which to wrap himself. He remained that way until about 6 P. M. Malinski claims he was beaten by the police during that period. The police denied this. There was no visible sign of any beating, such as bruises or scars; and Malinski made no complaint to the judge on arraignment nor to the jail authorities where he was later held. Sometime during Friday morning Spielfogel was brought to the hotel. He and Malinski were put alone together in a room sometime that afternoon. Shortly after their conference—apparently around 5:30 P. M. or 6:00 P. M.—Malinski confessed to the police. After it was made Malinski was allowed to dress. Malinski was kept at the hotel that night and the next three days. The record does not show exactly how long and frequent the questioning was after the first confession. But it is clear that Malinski was questioned in the early hours of Saturday, the 24th and at other times during that day. He was further questioned on Sunday, the 25th, and taken with Spielfogel from the hotel to the scene of the crime where he identified several places which had a relationship to the commission of the crime and where he pointed out how the crime was executed. On Monday, the 26th, he was taken from the hotel to the police garage where he identified the automobile used in the robbery. At about 5:00 P. M. on Monday he was taken to a police station and questioned. On Tuesday morning, October 27th, about 2 A. M. he made a confession at the police station. That confession was introduced at the trial. Shortly thereafter—about 4:00 A. M.—he was booked and put in a cell and soon arraigned.

The trial court held a preliminary hearing on the voluntary character of the confession of October 27th before allowing it to be introduced in evidence. There is a question in the case whether the confession of October 23rd as well as that of October 27th was submitted to the jury, a question to which we will return. It is sufficient here to note that the trial court charged the jury that a confession should not be considered by them unless they found beyond a reasonable doubt that it was voluntary. And they were told that although the delay in arraignment was not conclusive, they might consider it in passing on the question of voluntariness. The Court of Appeals sustained the judgment of conviction by a divided vote.[1] But the question whether there has been a vio-

[1] The Court of Appeals did not divide on the issue which is before us. The dissenting judges thought (1) that Spielfogel was an accomplice and

lation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession is one on which we must make an independent determination on the undisputed facts. *Chambers* v. *Florida*, 309 U. S. 227; *Lisenba* v. *California*, 314 U. S. 219; *Ashcraft* v. *Tennessee*, 322 U. S. 143.

If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. *Ashcraft* v. *Tennessee*, *supra*, p. 154. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. *Lyons* v. *Oklahoma*, 322 U. S. 596, 597.

If the evidence alone is considered, there is serious doubt whether the confession made one late afternoon of Friday, October 23rd (the first day of Malinski's detention) was admissible under the rule of *Chambers* v. *Florida*, *Lisenba* v. *California*, and *Ashcraft* v. *Tennessee*, *supra*. If the confession had been the product of persistent questioning while Malinski stood stripped and naked, we would have a clear case. But it was not. Malinski was stripped when he arrived at the hotel so that he might be examined for bullet wounds.[2] He remained in that condition several hours—much longer than any such physical examination could possibly justify. But it does not appear that he was subjected to more than occasional questioning during that period. No confession was obtained from him at that time. He said he was beaten; but that was disputed. And the assertion has such a dubious claim to veracity that we lay it aside. In any event, he soon had his shoes, socks, and underwear back on and a blanket in which to wrap himself. He complained of that treatment in his testimony. The police justified it with the dubious explanation that it was to make certain that Malinski did not escape. Yet the record does not show any persistent and incessant—let alone gruelling—questioning by the police while Malinski was only partially clothed. There are many gaps in the chronological narrative of what transpired that day. But several circumstances stand out. Malinski was held incommunicado; he was not allowed to see a lawyer, though he asked for one, and he was not allowed to see friends.

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that the conviction of Rudish was not supported by corroborative evidence; and (2) that the instruction concerning the voluntary character of the confession was not adequate.

2-While the robbers were escaping the wounded policeman fired several shots some of which hit the car in which they made their escape.

with one exception.[3] That exception was Spielfogel.[4] As we have noted, he and Malinski had a private conference that afternoon. Malinski was told that Spielfogel was there. Malinski asked to see him. Spielfogel's version of what transpired varies from Malinski's. The former says that Malinski told him the police knew so much that Malinski figured he "might as well go out there and tell them the rest." Malinski said that he asked Spielfogel, "What are you doing with me?"; and that Spielfogel replied, "don't let them hit you. You know you didn't do it. Go out and say I told you to tell the truth." Shortly thereafter Malinski made his confession of October 23rd. If that evidence alone is not sufficient to show that that confession was coerced, the comments of the prosecutor place it beyond doubt. For in his summation to the jury he made certain statements which the Court of Appeals said were "indefensible" (292 N. Y. p. 373) and which we think are sufficient to fill in any gaps on the record before us and to establish that this confession was not made voluntarily. He said that Malinski "was not hard to break"; that "He did not care what he did. He knew the cops were going to break him down." And he added:

"Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology — let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

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[3] The matter was described by the prosecutor in a rather shocking manner: "They hold men for several days. Are you satisfied with that? They are not going to let him go home, or let him get hold of a smart mouthpiece to preach about his rights and sue out writs. You want a District Attorney in this county that is worth his salt, not a powderpuff District Attorney. When you are trying a case of murder, especially murder of a police officer, you don't go over and give him a pat on the back and say, 'Do you want anything? Do you want to have your lawyer or your wife or somebody else?' In fact after that they would not even let him see Mr. Math, an assistant in our office; they would not even let him talk to a rabbi. Do you think McNally, 17 years in the Police Department, is going to let this jerk from the East Side tell him his business."

[4] As the Court of Appeals points out (292 N. Y. p. 375), Spielfogel and Malinski had an agreement that if either went to prison the one who was free would help take care of the other's family. After Spielfogel went to Sing Sing Malinski contributed for a while to the support of Spielfogel's wife. When Malinski refused to pay any more, Spielfogel unburdened himself to two other convicts, Yellin and Kovner, "but with no intention of acting against Malinski for, curiously enough, testimony is in this record that, after knowledge of what had occurred in the shooting of Fox reached the police department and a lieutenant of police was sent to Sing Sing prison to interview Spielfogel, he refused to talk to the police officer. Even after that police officer had told him all that Spielfogel must have told to Yellin and Kovner he still evinced no interest in helping the police. It was only later that he consented to talk."

If we take the prosecutor at his word, the confession of October 23rd was the product of fear—one on which we could not permit a person to stand convicted for a crime.

But it is said that this coerced confession was not introduced in evidence, that it was submitted to the jury only insofar as it threw light on the voluntary character of the subsequent confessions, and that under the rule of *Lyons* v. *Oklahoma, supra*, p. 601, the adequacy of that instruction to the jury is solely for the state courts to determine. We do not think, however, that *Lyons* v. *Oklahoma, supra*, fits this case.

The confession of October 23rd was oral. Its details were not put in evidence. But Spielfogel, a witness for the prosecution, adverted to it in his testimony, saying that Malinski told "everything" at that time. A police officer testified on behalf of the prosecution to the same effect. The prosecutor referred to it in his summation in language which we have already quoted. He added that "Six o'clock in the evening after he (Malinski) was picked up, he told the whole thing". When the confession of October 27th (which was a detailed confession taken down by a stenographer) was offered in evidence, a preliminary hearing was had. That hearing covered the voluntary character of the October 23rd confession as well as the October 27th confession. The trial court in its charge to the jury reviewed the events leading up to the confession of October 23rd—the prosecutor's version, Malinski's version. It then referred to the delay in arraigning Malinski, stating that the police claimed they were willing to arraign Malinski on the day of his arrest but that Malinski preferred to stay at the hotel with Spielfogel. It then charged:

"Be that as it may, I charge you that it was the duty of the police to arraign the defendant before the nearest Magistrate without unnecessary delay, and, further, that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor.

"But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinsky, including the one made in the early hours of October 27th at the Bath Beach station house.

"However, I am charging you that the failure to arraign, in and of itself, is not conclusive against the People, and does not in and

of itself, standing alone, destroy the validity of the confession. Is that clear?

"On the question whether Malinsky was coerced, you may consider that he made no complaint to the Magistrate when arraigned and did not seek the services of the jail physician. That evidence, if true, is not, however, conclusive against Malinsky, but may be considered by the jury on the issue of the voluntariness of the confession."

Malinski made no objections to these references to his confession of October 23rd. And while he asked for a mistrial because of the prosecutor's comments, he made on this phase of the case no requests to charge which were refused. The Court of Appeals, however, did not hold that Malinski was precluded from objecting[5] to the use made at the trial of his confession of October 23rd. It considered his objection that "it was error for the court to submit to the jury the confession made by Malinski orally on October 23rd" as well as the other three confessions made to the police. 292 N. Y. p. 370. And it made plain, when it held that Malinski's "confession" should not have been excluded as a matter of law, that it meant "not only the confession made orally to a police officer on the Friday night of the arrest but also the two automobile trips on Sunday and Monday, one to the police garage to permit Malinski to identify the automobile used in the crime and the other to Coney Island to revisit a restaurant and the scene of the crime, and the confession to the District Attorney which was taken stenographically in the early morning of Tuesday, October 27th." 292 N. Y. pp. 373-374. Its ruling was that none of the four confessions was involuntary as a matter of law. Thus as we read the opinion of the Court of Appeals, it reviewed the judgment of conviction on the basis that all four confessions to the police had been submitted to the jury. We find no indication that it construed the record to be like the one in *Lyons* v. *Oklahoma*, *supra*, where consideration of the first coerced confession was strictly limited to the voluntary character of subsequent confessions. Nor do we think that the record before us can be fairly construed in that manner.

There were repeated references at the trial to the confession of October 23rd. The prosecutor made emphatic references to it in his summation. On this record the fact that Malinski confessed to the crime shortly after he was arrested stands out in bold relief. The use made of the confession could hardly have been more

[5] New York has the rule that in capital cases a new trial may be ordered in the interests of justice though no exception was taken in the trial court. Gilbert's Anno. Criminal Code & Penal Law (1943) § 528; People v. Jung Hing, 212 N. Y. 393, 405; People v. Lytton, 257 N. Y. 310, 313.

effective had its details been put in evidence. It was not insulated from the trial. The part of the charge to the jury which we have quoted may possibly have been an effort in that direction. But it is more susceptible of the interpretation that the delay in arraignment, not the first confession, was to be considered "solely on the question as to whether or not the alleged confession later made was the result of the coercion". That seems to have been the interpretation given the charge by the Court of Appeals. 292 N. Y. p. 374. No more explicit charge was given. The jury at no time was admonished that it could not convict on the basis of the first confession nor consider it as evidence against Malinski. We must consider the case, therefore, as one in which a coerced confession was employed to obtain a conviction. Coerced confessions would find a way of corrupting the trial if we sanctioned the use made of the October 23rd confession in this case. Constitutional rights may suffer as much from subtle intrusions as from direct disregard.

It is thus apparent that the judgment before us rests in part on a confession obtained as a result of coercion. Accordingly a majority of the Court do not come to the question whether the subsequent confessions were free from the infirmities of the first one.[6]

II.

We have not mentioned Rudish. He did not confess to the police. He was tried jointly with Malinski, his counsel electing not to ask for a severence. We are asked to reverse as to Rudish because the confession of October 27th which was introduced in evidence against Malinski was prejudicial to Rudish. It is argued that that course is indicated by *Anderson* v. *United States*, 318 U. S. 350. In that case we reversed a judgment of conviction against all the defendants though the confessions which had been introduced were the confession of only some of them. But in that case we were reviewing a criminal proceeding in a federal District Court over which we have more control than we do over criminal trials in the state courts. *McNabb* v. *United States*, 318 U. S. 332. Moreover, in the *Anderson* case the jury was told that in considering the guilt or innocence of each defendant they could consider the whole proof made at the trial. And it appeared that the prosecution leaned heavily on the confessions to establish its case against all the defendants. The furthest we have gone in a comparable case from a state court is to vacate the judgment

[6] Mr. Justice BLACK, Mr. Justice MURPHY, and Mr. Justice RUTLEDGE join in Part I of this opinion.

against the co-defendant who did not confess and remand the case to the state court for further consideration. Thus in *Ashcraft* v. *Tennessee*, 322 U. S. 143, 155, we followed that procedure, at the suggestion of the Attorney General of the State, where the judgment against the co-defendant who did not confess was sustained by the state court on the assumption that the confession which we held to be coerced was properly admitted and that the conviction of the defendant who did confess was valid.

We do not believe that procedure is appropriate in this case even though it be assumed *arguendo* that the confession of October 27th was involuntary. It is true that that confession referred both to Rudish and to Indovino. But before that confession was offered in evidence the trial court with the complete approval of counsel for Rudish worked out a procedure for protecting Rudish and Indovino. "X" was substituted for Rudish, "Y" for Indovino. The jury were plainly instructed that the confession was admitted against Malinski alone and that they were not to speculate concerning the identity of "X" or "Y". When it came to the charge, the trial court submitted the case against Rudish separately from the one against Malinski.[7] The Court of Appeals in sustaining the judgment against Rudish in no respect relied on any confession to the police which Malinski made. And when it turned to the comments of the prosecutor, which we have quoted, it noted that they concerned Malinski not Rudish. 292 N. Y. p. 373.

On this record the questions raised by Rudish involve matters of state procedure beyond our province to review. *Barrington* v. *Missouri*, 205 U. S. 483. Since the case against him, both as tried and as sustained on review, was not dependent on Malinski's confession of October 27th, we think it inappropriate to vacate the judgment as we did in *Ashcraft* v. *Tennessee*, *supra*, though we assume that that confession was coerced. Whether our reversal of the judgment against Malinski would as a matter of state law affect the judgment against Rudish is not for us to say. In each case our mandate will provide for a remand to the Court of Appeals for proceedings not inconsistent with this opinion.

The judgment against Rudish is affirmed.

The judgment against Malinski is reversed.

It is so ordered.

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[7] This treatment of the matter seems to have followed the procedure adopted in New York in case of joint trials. See People v. Snyder, 246 N. Y. 491, 497; People v. Fisher, 249 N. Y. 419, 424, 427.

SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1944.

Morris Malinski and Sidney Rudish, Petitioners, *vs.* The People of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[March 26, 1945.]

Mr. Chief Justice Stone.

Mr. Justice Roberts, Mr. Justice Reed, Mr. Justice Jackson and I think the judgment should be affirmed as to both petitioners.

Malinski, charged with murder, made several confessions of guilt, which were introduced in evidence at his trial. Two, made to the police, are alleged to have been coerced, the first on October 23rd and the other four days later on October 27th. During that time he admitted to the police other isolated facts which tended to fasten guilt upon him. Three friends of Malinski also testified that on several occasions shortly after the commission of the crime and long before his arrest, he voluntarily admitted to them and to his sister that he had committed the crime.

The testimony as to whether the first confession to the police was coerced was sharply conflicting. There was no evidence that petitioner was subjected to any coercion at or about the time of the second confession to the police, save as the jury could find that the coercion, if any, attending the first confession continued to operate so as to induce the second.

The trial court, after reviewing fully the evidence of petitioner's detention and the coercion by the police which is said to have attended his first confession, and of the delay in his arraignment, instructed the jury:

"This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinsky, including the one made in the early hours of October 27th. . . ."

The trial court also correctly instructed the jury that petitioner's contention was that the confession of October 27 was tainted by the detention and coercion which had preceded it, and that "you must find beyond a reasonable doubt that this confession was a voluntary one before you would have the right to consider it." With respect to this later confession, the jury was further instructed:

"If you find beyond a reasonable doubt that the confession is a voluntary one, you will then determine whether or not the statements inculpating the defendant, therein contained, are true. If you shall have resolved both these questions in favor of the prosecution, then and only then will you consider the confession in determining the guilt or innocence of the defendant. . . ."

There were no exceptions to these instructions and no requests for a further charge on this subject.

After a painstaking review of the facts, the New York Court of Appeals unanimously sustained the jury's verdict that the confessions were not coerced.[1] That court, on appeal from a judgment of death, has power, which we are not free to exercise in a case coming from a state court, to make new findings of fact, Art. 6, § 7 of the New York Constitution of 1939;[2] *People* v. *McGrath*, 202 N. Y. 445, 450, and also to give judgment without regard to technical errors, defects or exceptions not affecting substantial rights. N. Y. Code Crim. Proc., § 542.

It seems to be recognized by this Court that the question whether the second confession was coerced was properly submitted to the jury. But it holds that the first confession was coerced and was submitted to the jury as itself proof of guilt, and that for that reason the verdict must be set aside although the jury found under the instructions of the court, which we have quoted, that the second confession was not coerced.

Even though the first confession were the product of coercion, the trial court, as we have pointed out, instructed the jury that the evidence with respect to the first confession was adduced only to show that the second was coerced. And the jury was instructed that it could consider the second confession, only if it found it

[1] The chief judge and two others, dissenting, thought that the conviction should be reversed because of the insufficiency of the charge as to the delay in arraignment; they apparently relied on state grounds, and not on the federal constitution.

[2] The amendment to Art. 6, § 7, effective January 1, 1944, retains this power in the Court of Appeals.

voluntary, and that it could convict in that case. In view of these instructions, we cannot say that the first confession was submitted to the jury, or that in the absence of any exception or request to charge more particularly, there was any error, of which petitioner can complain. Hence the jury's verdict must be taken as conclusively establishing that the second confession was voluntary and was not induced by any coercion attending the first. *Lyons* v. *Oklahoma*, 322 U. S. 596.

But even if it could be said, as the Court of Appeals seems to have thought, that the jury's verdict was a determination that the first confession was not coerced, we perceive no ground on which that determination can be disregarded. This Court recognizes that if only the testimony submitted to the jury be considered, the question whether the first confession was coerced was for the jury. The Court sets aside the jury's verdict solely because of the interpretation it places upon the conflicting testimony in the light of certain remarks, which the opinion of Mr. Justice DOUGLAS quotes, made by the prosecuting attorney in the course of his summation to the jury. But the prosecutor did not testify in the case, and it does not appear that he was present at any of the interviews of petitioner by the police, or had any knowledge of the alleged coercion. At most, his remarks were an ill advised attempt at justification of the coercion which the defense had alleged. He added no word by way of proof or admission to the evidence already before the jury. The jury, acting within its province, could have concluded, as it evidently did, that the prosecutor's remarks did not tend to prove anything more than his own ineptitude. The Court's decision thus sets aside the conviction by the process of re-weighing the conflicting testimony as to the alleged coercion, in the light of the arguments addressed to the jury.

It is not the function of this Court, in reviewing, on constitutional grounds, criminal convictions by state courts, to weigh the evidence on which the jury has pronounced its verdict, also in the light of the arguments of counsel, or to sit as a super-jury. We have, in appropriate cases, set aside state convictions as violating due process where we were able to say that the case was improperly submitted to the jury or that the unchallenged evidence plainly showed a violation of the constitutional rights of the accused. *Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227; *Ward* v. *Texas*, 316 U. S. 547. But we have

not hitherto overturned the verdict of a state court jury by weighing the conflicting evidence on which it was based.

The rightful independence of the states in the administration of their own criminal laws in their own courts requires that in such cases we scrupulously avoid retrying the facts which have been submitted to the jury, except on a clear showing of error substantially affecting the constitutional rights of the accused. We agree that the controlling principles upon which this Court reviews on constitutional grounds a state court conviction for crime, are as stated in the opinion of Mr. Justice FRANKFURTER. But the due process clause of the Fourteenth Amendment is concerned with matters of substance. It cannot rightly be made the instrument of reform of the manners of state officials. And however reprehensible or even criminal the acts of state officials may be, in so far as the conduct of the trial is concerned, they do not infringe due process unless they result in the use against the accused of evidence which is coerced or known to the State to be fraudulent or perjured, or unless they otherwise deny to him the substance of a fair trial, which is due process. See *Lisenba* v. *California*, 314 U. S. 219, 235-238; *Buchalter* v. *New York*, 319 U. S. 427, and authorities cited.

Judged by these standards, we think that there was no denial of due process in submitting petitioner Malinski's confessions to the jury in the manner in which they were in fact submitted, and that there is no constitutional ground for setting aside the jury's verdict against him. We cannot say on this record that the jury was not rightly permitted to determine whether petitioner's confessions of guilt to the police were coerced, or that the verdict was without support in the evidence, or that the instruction that the jury could find the defendant guilty if it found that the second confession was not the result of the alleged coercion at the time of the first, was not properly given.

Petitioner Rudish has raised no substantial federal question reviewable here, and his conviction, as well as Malinski's, should be affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1944.

Morris Malinski and Sidney Rudish, Petitioners, *vs.* The People of the State of New York.	On Petition for Certiorari to the Court of Appeals of the State of New York.

[March 26, 1945.]

Mr. Justice Frankfurter.

It is also my view that the judgment as to Malinski calls for reversal, leaving the disposition of Rudish's conviction in the light of such reversal to the New York Court of Appeals.

Apart from permitting Congress to use criminal sanctions as means for carrying into execution powers granted to it, the Constitution left the domain of criminal justice to the States. The Constitution, including the Bill of Rights, placed no restriction upon the power of the States to consult solely their own notions of policy in formulating penal codes and in administering them, excepting only that they were forbidden to pass any "Bill of Attainder" or "ex post facto Law", Constitution of the United States, Art. I, § 10. This freedom of action remained with the States until 1868. The Fourteenth Amendment severely modified the situation. It did so not by changing the distribution of power as between the States and the central government. Criminal justice was not withdrawn from the States and made the business of federal lawmaking. The Fourteenth Amendment merely restricted the freedom theretofore possessed by the States in the making and the enforcement of their criminal laws.

Unlike the limitations of the Bill of Rights upon the use of criminal penalties by federal authority, the Fourteenth Amendment placed no specific restriction upon the administration of their criminal law by the States. Congress in proposing the Fourteenth Amendment and the States in ratifying it left to the States the freedom of action they had before that Amendment excepting only that after 1868 no State could "abridge the privileges or immunities of citizens of the United States" nor "deprive any person of life, liberty, or property, without due process of law".

nor deny to any person the "equal protection of the laws". These are all phrases of large generalities. But they are not generalities of unillumined vagueness; they are generalities circumscribed by history and appropriate to the largeness of the problems of government with which they were concerned. "The privileges or immunities of citizens of the United States" derived from the two aspects of citizenship in our federal system. The safeguards of "due process of law" and "the equal protection of the laws" summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people. The history of American freedom is, in no small measure, the history of procedure.

Here we are concerned with the requirement of "due process of law" in the enforcement of a state's criminal law. Experience has confirmed the wisdom of our predecessors in refusing to give a rigid scope to this phrase. It expresses a demand for civilized standards of law. It is thus not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society. The suggestion that "due process of law", as guaranteed by the Fourteenth Amendment, is a compendious expression of the original federal Bill of Rights (Amendments I to VIII) has been rejected by this Court again and again and after impressive consideration. See, *e. g.*, *Hurtado* v. *California*, 110 U. S. 516; *Twining* v. *New Jersey*, 211 U. S. 78; *Brown* v. *Mississippi*, 297 U. S. 278; *Palko* v. *Connecticut*, 302 U. S. 319.

In the Bill of Rights, Eighteenth-century statesmen formulated safeguards against the recurrence of well-defined historic grievances. Some of these safeguards, such as the right to trial by a jury of twelve and immunity from prosecution unless initiated by a grand jury, were built on experience of relative and limited validity. "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." *Palko* v. *Connecticut*, *supra*, at 325. Others, like the freedom of the press or the free exercise of religion or freedom from condemnation without a fair trial, express rights the denial of which is repugnant to the conscience of a free people. They express those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", *Hebert* v. *Louisiana*, 272 U. S. 312, 316, and are implied in the comprehensive concept of "due process of law".

The Due Process Clause of the Fourteenth Amendment thus has potency different from and independent of the specific provisions contained in the Bill of Rights. Apart from all other considerations, how could it be otherwise without charging Madison and his great contemporaries in the framing and adoption of the Bill of Rights with writing into it a meaningless clause? The Fifth Amendment specifically prohibits prosecution of an "infamous crime" except by indictment; it forbids double jeopardy and self-incrimination, as well as deprivation of "life, liberty, or property, without due process of law". Not to attribute to due process of law an independent function but to consider it a shorthand statement of other specific clauses in the same Amendment is to charge those who secured the adoption of this Amendment with meretricious redundancy by indifference to a phrase—"due process of law"—which was one of the great instruments in the very arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen. Of course the Due Process Clause of the Fourteenth Amendment has the same meaning. To suppose that "due process of law" meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.

A construction which gives due process no independent function but makes of it a summary of the specific provisions of the Bill of Rights would tear up by the roots much of the fabric of law in the several States. Thus, it would require all the States to prosecute serious crimes through the grand jury system long ago abandoned by many of them, see *Hurtado* v. *California*, *supra*, to try such crimes by a jury of twelve which some of the States have seen fit to modify or abandon, see *Maxwell* v. *Dow*, 176 U. S. 581, to enforce the privilege against self-incrimination with the technical requirements prevailing in the federal courts when States, consistently with fundamental notions of justice, have seen fit to make other arrangements, see *Twining* v. *New Jersey*, *supra*, and to have jury trials "in Suits at common law, where the value in controversy shall exceed twenty dollars", a requirement which this Court has held over and over again for more than a hundred years does not apply to proceedings in state courts, see *Livingston* v. *Moore*, 7 Pet. 469, 551; *Walker* v. *Sauvinet*, 92 U. S. 90; *Pearson* v. *Yewdall*, 95 U. S. 294, 296. And we can hardly select one provision of the Bill of Rights and reject another, as for instance the provision of the Fourth Amendment against unreasonable search and seizure. Such a view would not only disregard the